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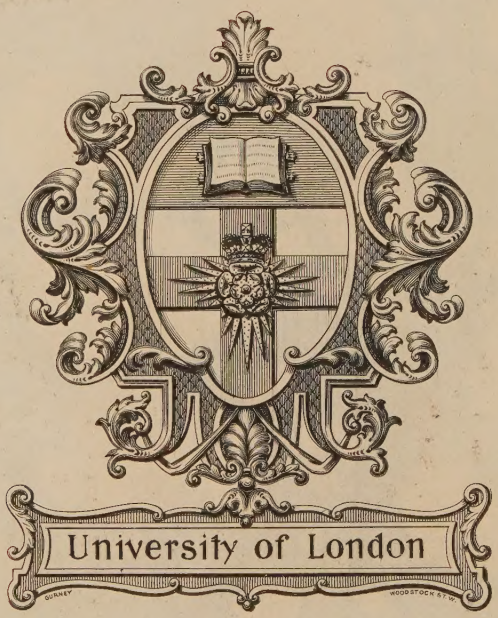

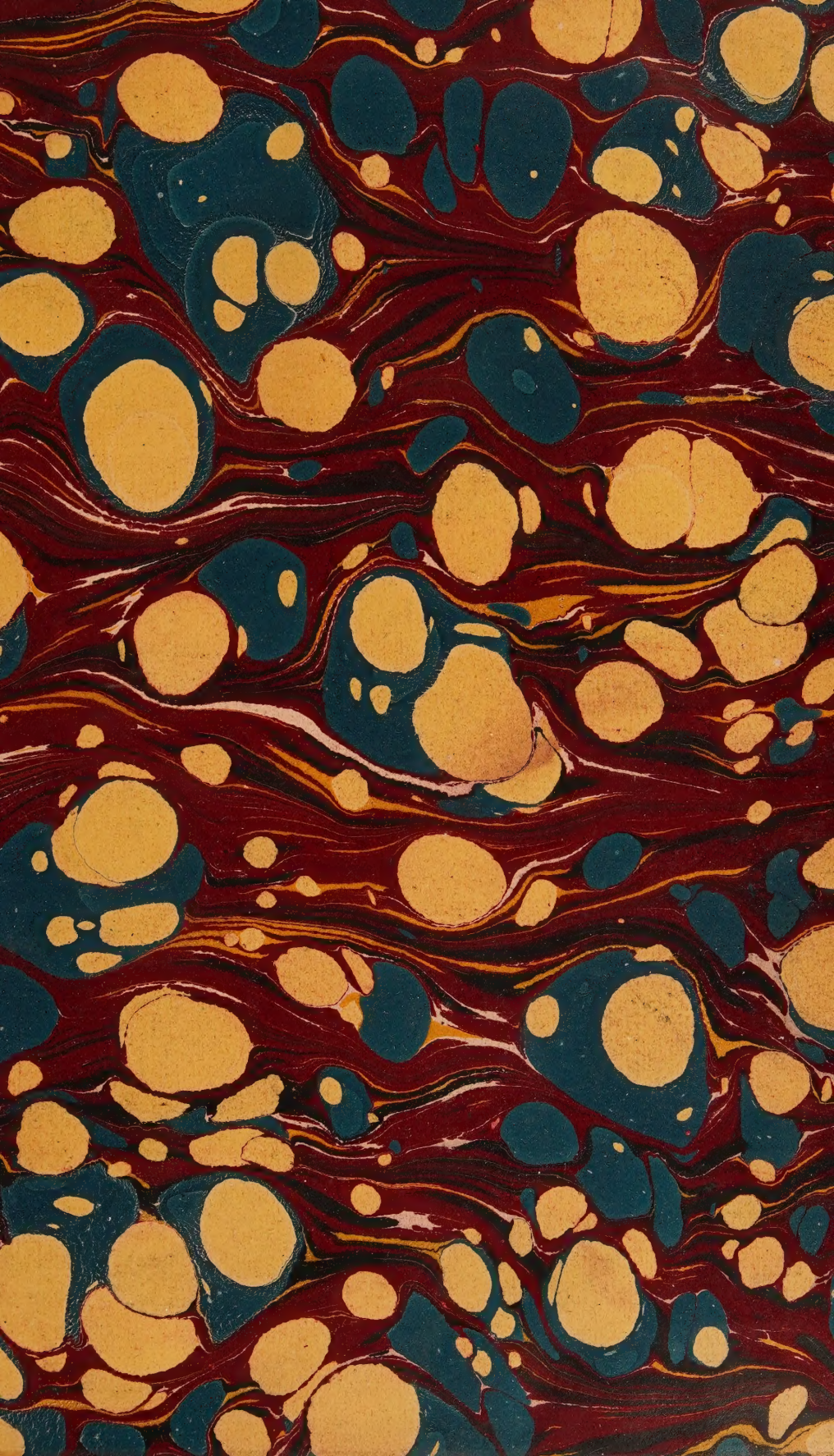

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CASES

HEARD AND DETERMINED BY

THE JUDICIAL COMMITTEE

AND THE

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY HERBERT COWELL, ESQ.,
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ERRATUM.

Page 411, line 28, *for* "Mr. Seward Price," *read* "Mr. Seward Brice."

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Appeal Cases

BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

THE HONOURABLE FRANÇOIS EVANTUREL . . . . . } DEFENDANT;

AND

DAME ÉMILIE MALVINA EVANTUREL, *et vir* ÉDOUARD REMILLARD . . . . } PLAINTIFFS.

J. C.*
1874
June 25, 26;
July 3.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Forfeiture—Conditional Legacy—Legatee prohibited from contesting the Will.

A testatrix, by her will dated the 18th of May, 1861, gave the usufruct of her estate to her son, the Appellant, charged with certain annuities in favour of her daughters and sisters, subject to the following condition :—

"*Je veux et ordonne et ma volonté expresse est que si mes dites filles, ou aucune d'elles, venait à faire soit directement ou indirectement aucune démarche quelconque pour contester mon présent testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elles qui voudraient ainsi chercher à contester mon présent testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession, et de la rente viagère susdite, et que quant à celles ou celle qui voudrait contester mon dit testament, le legs à elle fait de la dite rente soit non avenu et caduc; car telle est mon intention expresse.*"

One of the said daughters, her husband being co-plaintiff with her *pro*

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* *Present*:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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formâ, by protracted litigation, unsuccessfully impugned the said will, as not having been duly executed, and as having been obtained by fraud and captation, and undue influence of the Appellant. They obtained a decree of the Superior Court, avoiding the will on the ground of informal execution, which was reversed by the Court of Queen's Bench; the Superior Court then on remand dismissed the suit, having decided the issues as to fraud and undue influence against them. Those issues were finally abandoned by their counsel in oral argument before the Privy Council.

In an action brought thereafter by the Respondents (the said daughter and her husband) to recover from the Appellant, in respect of the annuity charged upon the estate as above, in which the Appellant pleaded a forfeiture thereof by the female Respondent under the penal clause by reason of said litigation:—

Held, firstly, that on the evidence the suit which impugned the will was the suit of the wife, acting as a free agent, in respect of her separate *chose in action*:

Secondly, that whether or not such penal condition attaches, if the contesting legatee desists from impugning the will before "*jugement définitif*," the Superior Court's decree of dismissal was such "*jugement définitif*."

Thirdly, that according to the true construction of the clause, it was neither void for uncertainty, nor contrary to good morals, nor prohibited by any positive law, nor contrary to public policy:

The 760th and 831st articles of the *Civil Code of Canada*, must be read together; and by virtue of their provisions all conditions in a will, unless according to the plain meaning and intention of the testator they be contrary to law, public order, or good morals are effective, and cannot be regarded as minatory only, or dependent for their application upon the discretion of the Court. Such discretion is not conferred upon the Courts by the Code, and though exercised by the old French Parliaments, has been since authoritatively condemned and repudiated.

Such a condition as that contained in the said penal clause can only, in practice, be applied where a will has been unsuccessfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament. It is not against public order for a testator to protect his estate and representative against unsuccessful attempts to litigate his will.

Semble, under English Law effect is given to a condition of forfeiture so long as it is a *conditio rei licitæ*, if there is a gift over on breach thereof.

Cooke v. *Turner* (1) approved.

THE main question decided in this appeal was as to the validity and legal effect of a penal clause contained in the will of one Dame *Marie Anne Bédard*, the widow of *François Evanturel*, which was in the following terms:—

"*Je veux et ordonne et ma volonté expresse est que si mes dites*

(1) 15 M. & W. 727

filles, ou aucune d'elles, venait à faire soit directement ou indirectement aucune démarche quelconque pour contester mon présent testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elles qui voudraient ainsi chercher à contester mon présent testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession, et de la rente viagère susdite, et que quant à celles ou celle qui voudrait contester mon dit testament, le legs à elle fait de la dite rente soit non avenu et caduc ; car telle est mon intention expresse."

Assuming it to be operative, the further question arose, whether the female Respondent, Dame *Emilie Malvina Remillard, née Evanturel,* a daughter of the testatrix, had thereunder forfeited her right to an annuity granted to her under the will, inasmuch as she, in conjunction with her husband, had contested the validity and due execution of that will, in a suit instituted by them to obtain a share of the succession as in case of intestacy. The decision of this latter question turned upon the nature of that suit and the part taken by the female Respondent therein.

The circumstances under which the above questions arose, together with a history of the litigation in which the said will was disputed, are sufficiently set forth in the judgment of their Lordships, and need not be repeated here. The final decision in favour of the validity of the will was pronounced by Her Majesty in Council, in the month of March, 1869, in the case of *Evanturel* v. *Evanturel* (1).

The action in which this appeal was made was thereafter commenced on the 28th of December, 1869, by the Respondents in the Superior Court for the Province of *Quebec* in the Dominion of *Canada,* in order to recover the arrears with interest of the annuity from the Appellant, on whose estate derived under the will the same was charged.

The Judge of the Supreme Court (*Taschereau,* J.) decreed in favour of the Respondents, with costs. On the 7th of December, 1871, the full bench of the Superior Court (*Meredith,* C.J., and *Bossé,* J., *dissentiente Taschereau,* J.) reversed this decision, and dismissed the action.

(1) Reported in Moore's P. C. Cases, vol. vi. (N.S.) 75 ; and Law Rep. 2 P. C. 462.

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The judgment of the Chief Justice *Meredith* contains the following discussion of the French authorities upon the question whether the penal clause above set out is contrary to public order:—

"It needs no argument to shew that if a will from any cause whatever be null, it could not be made operative by a penal clause; and it is equally clear that a legacy prohibited by law could not be shielded by a penal clause; but I know of no authority or argument which would justify me in saying that a penal clause, such as that now under consideration, may not lawfully be made use of for the protection of a legal will or bequest. Indeed, the learned writers cited in support of the judgment under review establish beyond doubt the distinction to which I have adverted.

"*Merlin*, the first of the authors cited in support of the judgment under review, expresses himself as follows: '*Encore une fois, les dispositions pénales n'ont rien que de valable, de légitime et de conforme aux principes de notre jurisprudence; mais cette règle admet les mêmes exceptions que celle qui autorise un testateur à disposer sous telles conditions qu'il trouve à propos. Comme on rejette, dans les dispositions conditionnelles tout ce qui est ou impossible ou contraire aux bonnes mœurs ou défendu par les lois, il faut pareillement rejeter et regarder comme non-écrites les clauses pénales qui ont pour objet des faits au-dessus de la capacité de l'homme, deshonnêtes ou prohibés.*' *Merlin*, Rep. vol. xxiii. p. 117 (*tit.* "*Peine Test.*," No. V.) And at the following page the same writer says: '*Le fait sur lequel roule la peine, est-il licite et possible ou ne l'est-il pas? Dans la première hypothèse la disposition est valable, dans la seconde elle est nulle et considérée comme non-écrite.*' *Merlin*, Rep. vol. xxiii. p. 118.

"*Pothier* is the second author cited in support of the judgment, and that great jurist expresses himself as follows: '*Au reste, il fallait en ce cas examiner avec grand soin quelle avait été la volonté du testateur, et si effectivement sa vue principale avait été de punir l'héritier par le legs dont il le grevait, ou simplement d'apposer une simple condition à ce legs; car, comme dit la loi,* 2 ff. de his quæ pœn. caus. pœnam a conditione voluntas testatoris separat. *Justinien a abrogé l'ancien droit, et a admis les legs* pœnæ causâ, *dans le cas où l'héritier ferait ou ne ferait pas quelque chose, pourvu que la chose*

que le testateur ordonnerait ne fût pas une chose contraire à l'honnêteté publique ou aux lois. L. un. cod. de his quæ pœn. caus.' *Pothier*, vol. vi. p. 321.

"*Furgole*, the third author whose opinion is given in support of the judgment, refers expressly to the case when a will is null, '*par quelque défaut de formalité,*' so that the passage quoted has no bearing upon a case such as the present where the will is in all respects unobjectionable. What *Furgole* does say (according to my view) bearing upon the present case, is this: '*L'effet de la charge ou condition de ne point troubler un légataire ou un co-héritier, à peine de privation de la libéralité faite à celui auquel la condition a été imposée, doit être réglée sur les principes que nous avons établis. Cette condition a-t-elle un mauvais motif? A-t-elle pour fondement un fait prohibé par la loi ou contraire aux bonnes mœurs? il faut la rejeter sans balancer. Mais au contraire, a-t-elle un motif juste, raisonnable, ou un fait qui n'a rien de contraire aux lois ni aux bonnes mœurs? il faut l'exécuter et lui faire opérer tout l'effet que le testateur y a attaché, et de la manière qu'il l'a ordonné; parce qu'une telle condition n'affecte pas moins la libéralité à laquelle elle est attachée que les autres espèces de conditions auxquelles la loi fait opérer leur effet de plein droit, ainsi que nous l'avons expliqué au tome 2, chap. 7, sect. 4, nombre 113 et suivants.*' '*Voilà pourquoi on ne doit avoir aucun égard à l'opinion de quelques auteurs qui ont prétendu que ces sortes de clauses ne devaient opérer aucun effet, ou qui ont si fort resserré leur effet par des restrictions ou des limitations qu'elles deviennent presqu'inutiles, parce que les sentiments de ces auteurs sont visiblement contraires aux véritables règles.*' *Furgole*, vol. iv. p. 213. And at p. 207 the writer, in a few words, places the matter in a very clear light: '*Toutes les difficultés sur la matière des dispositions pénales se réduisent à ce point vertical et décisif: ou le fait qui sert de fondement à la peine est licite et possible, ou ne l'est pas; au premier cas la disposition est valable et efficace, au second cas elle est inutile et considérée comme non-écrite.*"

"The only other authority from the old law quoted in support of the judgment is a passage from *Rosseau de Lacombe*, and in the following number the writer says: '*Mais l'apposition de la peine*

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est permise pour soutenir une disposition licite en sa forme et en sa substance, et pour empêcher un obstacle injuste à sa disposition licite.' Rosseau de Lacombe, p. 745.

"I now pass to the consideration of the modern French authorities bearing upon this point, and these authorities also I find I cannot view in the light in which they have been regarded in the judgment under consideration.

"The opinion of *Larombière* is referred to in that judgment as follows: '*M. Larombière, en son 3me volume de la Théorie des Obligations, No. 3 et p. 3, nous dit, qu'une telle clause est frappée d'une nullité radicale et absolue, comme contraire aux lois, aux bonnes mœurs, ou à l'ordre public, et que le maintien d'une telle clause aurait pour résultat indirect de maintenir des dispositions nulles et de faire fraude à la loi. Il fait cependant subordonner le rejet de la clause pénale au succès du contestant, qui, dit-il, plaide à ses risques et qui ne le fait impunément qu'à la condition de gagner son procès.*'

"The passage in *Larombière* which seems to be referred to in the judgment is in the following terms: '*Il convient alors d'appliquer les dispositions de l'article* 900 *aux clauses par lesquelles un donateur ou un testateur enjoint à ses héritiers, donataires ou légataires, de respecter ses libéralités, et de ne pas attaquer l'acte qui les contient, sous peine d'être déchus de tous les droits suivant lesquels ils ont été appelés à y participer. La clause pénale sera par suite réputée non-écrite, comme le serait la condition simple lorsqu'elle aura pour objet d'assurer l'exécution d'une disposition qui est frappée d'une nullité radicale et absolue, comme contraire aux lois, aux mœurs, ou à l'ordre public.*'

"The meaning of this passage, as I understand, is not, as the judgment supposes, that such a clause is radically null as being contrary to law, good morals, and public order, but that such a clause is to be deemed null, '*non-écrite, lorsqu'elle aura pour objet d'assurer l'exécution d'une disposition qui est frappée d'une nullité radicale et absolue, comme contraire aux lois, aux mœurs, ou à l'ordre public.*' *Larombière*, vol. iii. p. 3.

"Therefore it is plain that what is spoken of by the author as being contrary to law and good morals is not, as the judgment

under view supposes, the penal clause, but the illegal object sought to be enforced or protected by such a clause.

"The commencement of the same number shews beyond doubt that *Larombière* is of opinion that the introduction of a clause such as that in question in a will is perfectly legitimate.

"'*La stipulation d'une clause pénale peut avoir lieu dans un testament aussi bien que dans un contrat. La volonté du testateur n'est pas plus gênée dans son expression que celle d'un contractant, et les principes qui le régissent sont exactement les mêmes.*'

"'*Ainsi un testateur peut valablement, pour mieux assurer l'exécution de son testament, apposer une clause pénale par laquelle il prive ses légataires ou héritiers de tout ou partie du legs ou de l'hérédité s'ils attaquent ses dispositions. Cette condition n'a en soi rien de contraire aux prohibitions de la loi civile. Qu'importe en effet que le testateur les prive ainsi conditionnellement quand il peut ne leur rien donner du tout? Maître absolu de sa succession, il peut en disposer de la manière qui lui convient le mieux sans que nul soit fondé à s'en plaindre?*'

"In the judgment under review it is also said: '*M. Demolombe en son Cours du Code Napoléon, vol. xviii., étant le vol. i. des Donations entrevifs et testamentaires, aux Nos.* 283, 284, 285 *et* 286, *déclare une telle clause nulle et illégale; car, dit-il, l'accomplissement de ces solennités n'est pas seulement exigé dans l'intérêt des héritiers, elle est aussi, dans l'intérêt des testateurs, une garantie essentielle de la sincérité et de la liberté de leurs dispositions; et il ajoute au No.* 286 *que, malgré une telle clause les héritiers peuvent attaquer un testament pour cause de captation; et il cite la décision de la Cour suprême (Cassation du* 27 *mars,* 1855) *déclarant une telle clause comme non-écrite et contraire aux lois et aux mœurs.*'

"The extract from *Demolombe* in the above passage is taken from No. 285 of his work, where he refers to the case of a will '*qui ne serait pas revêtu des solennités exigées par la loi,*' and therefore, in my opinion, is inapplicable to the case before us, in which all the formalities required by law have been observed. The *arrêt* of the 27th of March, 1855, referred to in the same passage of *Demolombe,* concludes with these words (which *Demolombe* has placed in italics): '*Sauf à voir ultérieurement si cette clause pénale devrait ou non leur être appliquée,*' as to which he

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immediately adds: '*Cette dernière partie du considérant de l'arrêt témoigne que, s'il était décidé que le testament qui a été attaqué pour cause de captation était l'œuvre de la volonté libre du testateur, la clause pénale devrait être appliquée à l'héritier qui aurait succombé dans sa demande et qu'il n'en pourrait être affranchi qu'en réunissant.*' (*Comp. Cass.* 1845, *Mounier Dev.* 1846, 1, 5; *voy. les conclusions de M. l'Avocat Général Delangle.*)

"And *Demolombe* adds: '*Et telle est en effet la doctrine qui nous paraît devoir être admise, lorsqu'il s'agit d'une action en nullité qui était fondée sur un motif d'ordre public.* (*Comp. Aubry et Rau sur Zacharia, tom. vi. p.* 6.) 288. *Bien plus! lorsqu'il s'agit seulement d'une action en nullité, fondée sur l'intérêt privée de l'héritier, il n'y a pas à considérer s'il a réussi ou s'il a échoué, et il suffit en général, à moins de circonstances particulières qu'il ait contrevenu à la défense qui lui avait été imposée par le disposant d'attaquer l'acte par lui fait, pour que la clause pénale doive lui être appliquée.*

"'*C'est que, alors, comme il ne s'agit que de son intérêt privée, c'est à lui de faire son option comme il l'entendra, et il la fait à ses risques et périls.*'

"*Ricard toutefois s'exprimait ainsi:* '*Il est pourtant véritable que dans l'évènement, nous avons coutume de prendre ces peines écrites dans un testament pour comminatoires; et on se contente d'adjuger simplement le legs à celui auquel il est fait, sans le profit de la peine.*' (*Loc. suprà, No.* 1548.)

"*Demolombe* then gives his own opinion thus: '*Nous ne voudrions pas avancer une telle proposition; et nous pensons au contraire que le profit de la peine doit être adjugé, lorsque l'héritier a manqué à la condition que le testateur lui avait imposée de ne pas attaquer son testament; rien n'empêchant, disait Ricard lui-même* (*No.* 1547), *que les volontés licites des testateurs soient défendues par des conditions pénales légatoires. Seulement il y a lieu d'examiner en fait, dans quel cas le légataire aura effectivement manquée à cette condition.* (*Comp. Cass.*, 5 *juillet*, 1847, *Florin Dev.*, 1847, 1, 839).' *Demolombe*, vol. i., *Donations et Testaments*, No. 288, p. 319.

"It seems to me, therefore, sufficiently plain not only that *Demolombe* cannot be regarded as holding such a clause to be illegal and null; but, on the contrary, that according to the opinion of that writer, such a clause is legal, if used for the protection of a

legal bequest, and that it ought to be enforced where the legatee has really acted in opposition to the conditions of his legacy.

"The opinion of *Troplong* is, it is admitted, opposed to the judgment under consideration; but I desire, nevertheless, to quote a short passage from his treatise on donations and wills, which gives, in a few words, the opinion of that distinguished jurist as to the question under consideration. After referring to the *arrêt* of the Court of Cassation, of the 22nd of December, 1845, maintaining the validity of a clause such as that now before us, *Troplong* states his own views thus: '*Je pense que cet arrêt servira de règle à l'avenir. Il n'y a rien de plus respectable que la volonté d'un testateur qui cherche à prévenir les procès après sa mort, et oppose un frein à l'esprit contentieux de son héritier. La clause pénale doit donc produire ses effets salutaires, et telle est la décision de Justinien, qui, repoussant d'anciennes subtilités, veut que toutes les peines prononcées par le testateur soient exécutées quand elles ne conduisent à rien de honteux, d'impossible, et de contraire aux lois.*' *Troplong, Don. et Test.* vol. i. p. 282, No. 265.

"Indeed of all the modern writers quoted in support of the judgment under review, I know but one, *Zacharia*, who holds that a clause such as that in question ought, in all cases, to be held illegal; and his editors, Messrs. *Massé* and *Verge*, do not seem to share his opinion, for they add in a note: '*La condition de ne pas attaquer un acte nul quand cette nullité ne touche en rien à l'ordre public, n'a rien que de licite.*' And they cite a number of authorities in support of that opinion. *Zacharia*, vol. iii. p. 181. Note 14.

"The decisions of the French Courts, with hardly an exception, agree in holding the clause in question, when used for enforcing a valid bequest or will, to be indisputably legal, and it will be found that in a great number of those cases the penal clause was strictly enforced." See *Montal* v. *Richard* (1); *Mounier* v. *Duquesnel* (2); *Regnier* v. *Regnier* (3); *Moreau et al.* v. *Dumontier* (4); *Eschalie* v. *Eschalie* (5).

On the 8th of June, 1872, the Court of Queen's Bench (*Duval*, C.J., *Drummond*, *Badgley*, and *Monk*, JJ., *Caron*, J., dissenting)

(1) Sirey, 1843, vol. i. p. 374.
(2) Sirey, 1846, vol. i. p. 6.
(3) Dalloz, 1849, vol. i. p. 253.
(4) Dalloz, 1858, vol. i. p. 26.
(5) Dalloz, 1863, vol. i. p. 36; 1867, vol. ii. p. 36.

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reversed the judgment of the Superior Court. They held that the Respondents had not forfeited their right to the annuity by disputing the capacity and freedom of the testatrix, because such forfeiture could only be worked by reason of objections to the will which were prosecuted to final judgment; while the objections in this case had been voluntarily abandoned at the argument before the Privy Council, though not until after they had been overruled by unanimous judgments in both the Canadian Courts. They held, also, that the Respondents had not forfeited the legacy by contesting the due execution of the will, because a penal clause prohibiting such contest would be against public policy, and was at any rate only enforceable at the discretion of the Court, and should not be enforced in the present instance, since there had been good grounds for doubting if the execution were valid.

The judgment of *Badgley*, J., who delivered the judgment of the majority of the Court, contained the following discussion of the French authorities upon the question whether the clause is contrary to public order.

Part 27

"It is abundantly evident from the French law authorities generally that a testamentary condition which would prevent the contestation of an informal will was absolutely null and held to be unwritten, as well by the old law itself as by its declared provision set out in the declaratory enactment of the 760th code Article. '*Les formalités sont réglées par la puissance de la loi, et personne ne peut se soustraire à cette puissance, ni faire par quelque précaution que ce soit, que les lois ne puissent pas avoir lieu dans son testament ;*' so held by *arrêt* of the 28th of August, 1708, vol. v. *Journal des Audiences*, ch. 42, liv. 8. Such a condition in itself is rejected as a legal nullity, and as being beyond the legal capacity of the testator, and according to the terms of the 760th Article, 'In a will such a condition is considered as not written, and does not annul the disposition; *la disposition est considérée comme pure, et elle n'en est pas moins valable parce que la condition est regardée comme non-écrite,*' says *Furgole*, vol. ii. p. 114. *Ricard*, at No. 1544, says: '*On demande si le donateur ou le testateur peut interdire aux personnes qui ont intérêt de les combattre, la faculté de le pouvoir faire, et ce directement en l'ordonnant ainsi, ou indirectement par apposition de peine : à mon avis, où les moyens par lesquels la*

disposition peut être contestée regardent la forme, ou la substance et la nature; au premier cas l'interdiction du défunt ne peut jamais être d'aucune conséquence, parce qu'il n'est pas en son pouvoir de faire que les solennités de l'acte qu'il a passé, qui sont établies par les lois par force de droit public, n'y soient pas observées.' *Furgole* is of the same opinion: he says, vol. iv. p. 475: '*Si dans un testament qui est nul par quelque défaut de formalité, le testateur dit, "Je veux que mon testament soit exécuté, et si quelqu'un de mes successeurs légitimes l'attaque pour le faire casser, j'institue héritier un tel hôpital;" une telle disposition sera nulle et inutile, quand même par quelque privilége de l'héritier institué en cas de contravention, le testament ne manquerait d'aucune formalité pour le faire valoir à son égard, parce que les solennités du testament sont de droit public, que les formalités en sont réglées par la puissance de la loi, et que personne ne peut se soustraire à cette puissance, ni faire par quelque précaution que ce soit que les lois ne puissent pas avoir lieu dans son testament. C'est ce qui a été très-judicieusement observé par M. l'Avocat Général de Fleury, dans son plaidoyer lors de l'arrêt du 28 août* 1708,' above cited; and *Furgole* adds, 'that this nullity applies to penal dispositions in conditions contrary to the law, that is, contrary to *les coutumes ou les usages qui ont force de loi, parce que la puissance est toujours la même.*'

"*Ricard*, who was a highly esteemed Jurist under Customary Jurisprudence, has supplied *Furgole*, who was a Jurist under the Civil Law Jurisprudence of *France*, at *Toulouse*, a *province de droit écrit*, governed by the Roman law, with much of his, *Furgole's*, textual learning upon the general law of wills; and *Ricard*, discussing the power of attaching conditions to testamentary dispositions, draws the distinction between conditions as to the validity of the will itself and those as to the validity of the disposition contained in the will. He gives instances of both, and amongst those of the former, where the intention of the condition was to sustain the will as it was, he says: '*Où la disposition est absolument pénale et se renferme seulement dans la peine prononcée par le testateur, c'est-à-dire qu'il se voit que sa défense a été de faire subsister sa volonté contre la loi, Je veux que celui qui disputera mon testament et les legs par moi faits demeure privé de ma*

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succession et que sa part soit déférée à mes héritiers.' Compendious as is this example given by *Ricard*, it is the type of the penal clause contained in the will of Madame *Evanturel*.

"The only difference between these two penal conditions is, that *Ricard's* expressly gives over the legacy which that in the will of the testatrix does not; both are in general terms, and express a general intention that the will must be sustained, and the conclusion of *Ricard* as to his example must, being in like case, conclude the *Evanturel* condition. *Ricard* says, '*Pour lors comme on ne remarque dans cette disposition qu'un esprit d'arrogance et qui se veut élever au-dessus de la loi, pour empêcher l'exécution de ce qu'elle permet et de ce qu'elle a ordonné, une semblable disposition qui n'a d'autre but que de détruire la loi est censée comme non-écrite et on n'y a aucun égard.*' *Furgole* holds the same doctrine, and, as already observed by him, such a general penal condition has no effect, and hence, '*lorsque la condition est rejetée ou remise par la disposition de la loi, la disposition est considérée comme pure, et elle n'en est pas moins valable parce que la condition est regardée comme non-écrite.*' *Merlin*, and other French jurists of eminence, have adopted the same opinion. A good deal of judicial conflict arose in the Court below as to the power and right of attaching penalties to testamentary dispositions, which, as a rule of law, seem to admit of no doubt, as *Pothier*, in his vol. vi., p. 321, says, '*Pourvu que la chose que le testateur ordonnerait ne fût pas une chose contraire à l'honnêteté publique ou aux lois;*' and *Merlin*, vol. xxiii. *Répertoire*, p. 117, holds the same opinion. After stating that penal clauses may be attached to such dispositions, he adds, '*Il faut pareillement rejeter et regarder comme non-écrites les clauses pénales qui ont pour objet des faits au-dessus de la capacité de l'homme, deshonnêtes ou prohibés.*' The amending legislation above referred to did not interfere with this common law power, nor have the declaratory articles of our code done so. Such conditions for protecting valid bequests are fully recognised by the law, but do not affect this case, the contention here being not the validity of a bequest, but the alleged obnoxiousness of a will against the formal requirements of the common law in force here, which could not prevent the impugning of a will for informality.

"The fallacy upon which the adverse judgment below rests is in considering the penal clause as inserted for the mere protection of the usufructuary bequest, which is perfectly legal in itself, and has not been questioned, and required no such protection if the will was valid, whereas the penal clause was altogether apart from that disposition, or any particular disposition of the will, and affected the validity of the notarial will as a legal instrument. *Furgole*, in his vol. iv. pp. 470, 471, refers to this, and after mentioning an *arrêt* of the *parlement de Paris*, of the 23rd of April, 1709, vol. v., *Journal des Audiences*, which enforced the execution of a will notwithstanding the penal disposition in it, observes that penal dispositions are valid in the same way as simple conditional dispositions: '*que pour cette validité, il faut considérer la qualité des faits qui sont le fondement de la peine*,' and 'as penalties contrary to law in conditional dispositions are rejected and held as unwritten, so also they are rejected and held as unwritten in wills,' '*parce que l'on doit décider de leur validité* (*les dispositions pénales*) *par la qualité de la condition, et non par la peine qu'elles renferment, à cause que la peine seule ne fait pas obstacle à leur validité*,' &c. '*Cependant la disposition pénale ne doit pas profiter en faveur de qui elle est faite, lorsque la peine est fondée sur un fait*,' &c. &c., '*contraire aux lois ou aux bonnes mœurs; mais la chose doit demeurer à celui qui était chargé du fait contraire aux lois, à cause qu'il est dispensé par les lois mêmes de remplir ce fait, et qu'il ne doit souffrir aucune peine à raison de l'inexécution, parce que la loi même l'en garantit*,' concluding that the penalty is profitless when the fact upon which it is founded '*est tel qu'il ne peut et ne doit être rempli*;' in other words, a *conditio rei non licitæ*.

"It is evident, therefore, that the clause in question which tended to prevent, *directement ou indirectement*, the legal test of the validity of an alleged informal will was contrary to law and public order, *aux lois et à l'ordre public*, interfering with a question of *intérêt général*, formalities in wills being *publici juris*; and the rule would hold even if the will should be found to be formal, for, repeating *Furgole*, '*Une telle disposition sera nulle et inutile, quand même par quelque privilége de l'héritier institué, en cas de contravention, le testament ne manquerait d'aucune formalité pour le faire valoir à son égard, parce que les solennités du testament sont du droit public*,

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que les formalités en sont réglées par la puissance de la loi, et que personne ne peut se soustraire, ni faire par quelque précaution que ce soit que les lois ne puissent pas avoir lieu dans son testament;' and so also held by *Pollet*, cited approvingly by *Merlin, verbis Peine Testamentaire*, pp. 193-4, '*pour assurer,*' *dit Pollet,* '*l'exécution de ses dernières volontés, on prend ordinairement la précaution d'imposer la peine de privation à ceux des héritiers qui entreprendront de les débattre. Cette précaution est aujourd'hui sans effet; l'héritier qui se pourvoit en justice contre la disposition du défunt, n'encourt pas la peine de la privation à moins que la poursuite ne puisse être accusée d'une calomnie toute évidente.*' Under these circumstances the penal clause in the will should be regarded as unwritten; this is a conclusion of fixed law entirely unconnected with judicial interpretation, and therefore the annuity legacy is by law a pure and unconditional disposition existing in favour of the legatee."

From this judgment of the Court of Queen's Bench the Defendant appealed to Her Majesty in Council.

Mr. *Benjamin*, Q.C., and Mr. *Bompas*, for the Appellant, after referring to the evidence on the record to shew that the Respondent was a free agent in the litigation instituted to contest the will, that the litigation was of the character prohibited by the penal clause, and that therefore the Respondents were within its operation, contended that the said clause was valid. They relied upon the reasoning of *Meredih*, C.J., given above. As to the old law, *Ricard*, p. 817, vol. iii. c. 12, No. 1547, was absolutely conclusive. They referred also to *Civil Code of Canada*, Article 760. The testatrix had given her whole estate, subject to a charge, on condition that her daughters were to elect, either to take the annuity and acquiesce in the will, or, if they attacked the will, to lose the annuity. The question was, whether the condition imposed by the clause was illegal. If the purpose which a condition is intended to subserve is lawful, then the condition itself is lawful; if the purpose is unlawful, so also is the condition unlawful. This condition would be illegal if it were designed to prevent a person from attacking an illegal or immoral will. See *Civil Code*, Art. 831. You cannot effect a purpose which is contrary to law, good policy, and good morals, by a penal provision. By the Roman law a testator

who could not take away his property from his heir imposed a charge upon it with a penal provision. If that was merely to annoy the heir it was nugatory, if otherwise, valid. See *Pothier*, vol. vi. p. 321, tit. "*Testament*," ch. 2, art. 3. And according to the true meaning of the French authorities cited in reference to a penal clause it follows that if a testator says, "I have done my best to make a valid will, and, although I may have failed, any one who disputes it shall lose his legacy," that is a valid condition. [SIR B. PEACOCK:—You mean that a testator may lawfully say, that a person who wastes my estate by litigation, and exposes family affairs to my prejudice, is not an object of my bounty.] The *Code Napoléon* has not altered the law as laid down by the authorities. See Art. 900, and cases and authorities cited by *Sirey* in his note thereto.

Moreover, the condition in this case has all the effect of a gift over, for the estate is given subject to a charge, which charge is extinguished if the legatee in whose favour it is made attacks the will. See *Cooke* v. *Turner* (1); *Jarman* on Wills, vol. ii. p. 52, 53; *Redfield* on Wills, Part II., p. 679, No. 34. The passages cited by Mr. Justice *Badgley*, from *Story's* Eq. Jurisprudence, vol. i. § 290, and vol. ii. § 1318, refer, one to a condition in restraint of marriage, which is known to be illegal, and the other to the difference between a penalty in a bond and liquidated damages, and are no grounds for holding that this condition is, as he says, minatory only, and not to be put in operation.

Mr. *Bowring*, for the Respondent, contended, on the evidence, that the female Respondent had not been a party to the contentious litigation regarding the will in the sense of actively desiring herself to dispute the will. Her husband was not merely a formal party Plaintiff, but had a clear interest in the suit as the administrator of his wife's estate under the *Code Napoléon*. The action was taken by him alone, without the consent of his wife: *Dunne* v. *Dunne* (2). As to the penal clause, it was void for uncertainty; *e.g.*, the phrase "*directement ou indirectement*." It must be construed as a whole, and no effect could be given to a prohibition against indirectly taking any step to dispute a will. It is impossible to define

(1) 15 M. & W. 727.

(2) 7 De G. M. & G. 207.

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what the testator meant by "indirect contestation." Such a condition is *strictissimi juris*, and must be clear and certain in its terms. See *Fillingham* v. *Burnley* (1), in reference to heir and residue, and 2 *Jarman* on Wills (1861), p. 13, as to conditions subsequent. He referred to passages in the French authorities which distinguish between a condition of this nature affecting the whole testament and a condition affecting a particular clause in it: 1 *Furgole*, sect. 13; 2 *Bourjon, Droit Commun de la France*, Pt. v., c. 1, pp. 343–363, pars. 1, 2; 1 *Ricard, Traité des Donations*, c. 12, pp. 769, 770, pars. 1543–1548; 4 *Furgole*, p. 250, s. 133; 1 *Furgole*, p. 532, s. 126; *Rousseau de la Combe's Recueil de Jurisprudence*, p. 311; 1 *Furgole*, 542–546; *Merlin's Répertoire de Droit*, vol. ix., p. 227.

As to the English authorities upon the question of a condition being treated as minatory only, or as void in the absence of a gift over, he cited *Cooke* v. *Turner* (2); *Cooke* v. *Turner* (3); *Cooke* v. *Turner, Cooke* v. *Cholmondeley* (4); *In re Dickson's Trusts* (5).

Mr. *Bompas*, in reply.

1874 *July* 24.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The Appellant is the son and the female Respondent a daughter of Dame *Marie Anne Bédard*, who, being then the widow of the late *François Evanturel*, died on the 18th of November, 1863.

By her solemn testament, passed before two notaries, and dated the 18th of May, 1861, she gave the usufruct of all her estate to her son, the Appellant, for his life, but "*à la charge*" or subject to the obligation of paying a life annuity of £25 to each of her four daughters, and two smaller annuities to her sisters. Subject to this disposition the testatrix bequeathed "*la propriété de ses dits biens, meubles et immeubles*," to the children born and to be born of the marriage of the Appellant with his then wife, equally, constituting them her "*légataires universels en propriété*."

(1) 1 T. & R. 536.
(2) 15 M. & W. 727.
(3) 14 Sim. 500.
(4) 15 Sim. 611; see also 16 Sim. 482.
(5) 1 Sim. (N.S.) 37, 46; 20 L. J. (N.S.) (Ch.) 33.

The 6th clause of the testament, on which all the questions now to be determined depend, is in the following words:—

"*Sixièmement. Je veux et ordonne et ma volonté expresse est, que si mes dites filles, ou aucune d'elles, venait à faire, soit directement ou indirectement, aucune démarche quelconque pour contester mon présent testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elles qui voudraient ainsi chercher à contester mon présent testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession et de la rente viagère susdite, et que quant à celles ou celle qui voudrait contester mon dit testament, le legs à elle fait de la dite rente soit non avenu et caduc; car telle est mon intention expresse.*"

The legal heirs of the testatrix were the Appellant and her four daughters, viz., Dame *Marguerite Evanturel*, the wife of *Alfred Paré*, Dame *Sophia Evanturel*, wife of *Louis T. Suzon*, the Respondent, Dame *Emilie Malonia Evanturel*, wife of the Respondent, *Edouard Remillard*, and Demoiselle *Elmira Algré Evanturel*, who alone of the four was unmarried at the date of the will and that of her mother's death.

On the 7th of December, 1863, within one month of the death of the testatrix, an action was commenced in the names of the Respondents, claiming in right of the lady, as one of the coheirs of her mother, one-fifth of the succession, or, in the alternative, £2,500, with interest and costs, and alleging that the Respondent was in possession of the whole estate. It is unnecessary to go with any particularity into the pleadings in that action. It is sufficient to state that, in answer to the claim, the present Appellant set up the testament of 1861; that the Respondents impugned that document by an "*inscription en faux*," as not having been duly "*dicté et nommé*" to the two notaries; and, by another pleading, as having been obtained from the testatrix when not of testamentary capacity by the fraud and "*captation*," or undue influence, of the Appellant. The Superior Court, on the 5th of September, 1864, decided in favour of the Respondents upon the "*inscription en faux*," declaring the alleged testament to be null and void on the ground of its informal execution, and setting it aside with costs. But this decree was, on the 20th of June, 1865, reversed by the Court of Queen's Bench by a decree which set aside the "*inscription en faux*," and remanded the case in order that the Respondents might be at

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liberty to prove their allegations as to the incapacity of the testatrix, and the fraud and undue influence practised on her by the Appellant. These issues were decided against the Respondents by the Superior Court on the 16th of May, 1866, and, on appeal, by the Court of Queen's Bench on the 18th of March, 1867, the result of the two decrees of the latter Court being the dismissal of the Respondent's action. Against those decrees the Respondents preferred an appeal to Her Majesty in Council, which, on the 15th of March, 1869, was dismissed, both decrees being affirmed, and the testament finally established, with costs.

On the 28th of December, 1869, the Respondents commenced the action out of which this appeal has arisen, for the recovery from the Appellant of $700, in respect of the annuity given to the female Respondent by the will, being $600 for six years' arrears of the annuity, and $100 for interest.

The defence to the action made by the Appellant was in substance that, by means of the contestations by the Respondents of the testament in the former suit, the female Respondent had forfeited, under the 6th clause of that instrument, all right to the annuity, which ought, therefore, to be declared "*non avenu et caduc.*" To this defence the Respondents replied that the penal clause was bad in law; that the Respondent, *Edouard Remillard*, had a direct interest in the former action under the "*communauté de biens*" subsisting between him and his wife; that the penal clause could not affect this right; that he brought the former action against the will of his wife; and that the action was not vexatious, inasmuch as the invalidity of the will had, on the "*inscription en faux*," been affirmed by three Judges out of six.

The Judge of the superior Court, M. *Taschereau*, on the 6th of May, 1871, made a decree in favour of the Respondents. The full bench of the Superior Court, consisting of him and two other Judges, reversed that decision on review, and dismissed the action by a decree dated the 7th of December, 1871 (he dissenting). But on the Respondents' appealing to the Court of Queen's Bench, that Court (Mr. Justice *Caron* dissenting) by a decree dated the 8th of June, 1872, reversed the decree of the superior Court, and confirmed the original decree of Mr. Justice *Taschereau* in favour of the Respondents.

The present appeal is against this last decree.

The questions to be determined are the validity and legal effect of the 6th clause of the testament, and whether the female Respondent, if bound by it, has lost the right to insist on the payment of her annuity by reason of the proceedings in the former action.

Their Lordships think it will be convenient to follow the course taken on the argument before them at least by the Respondent's counsel; and assuming for the sake of argument the validity of the clause to consider in the first instance, the nature of the former action, and the part taken by the female Respondent therein.

It has been contended that the action in which the testament was disputed was the action, not of her, but of her husband; and that it was brought by him against her will, and in respect of his interest under the "*communauté de biens*," which the 6th clause in the will could not, and did not, purport to affect. To estimate the weight due to this argument, it is necessary to see what were the relations between the two Respondents under their marriage settlement.

By that instrument, which was executed on the 11th of June, 1860, the day before their marriage, it was stipulated as follows:—

"*Il y a aura communauté de biens entre les dits futurs époux conformément aux dispositions de la coutume de Paris, sauf les modifications suivantes, savoir: tous les biens et héritages, mobiliers et immobiliers, déjà échus, et qui écherront par la suite à l'un et à l'autre des dits futurs époux, soit par succession, donation, ou testament, n'entreront point dans la dite future communauté, mais au contraire sortiront nature de propres à celui à qui ils seront échus et advenus et aux siens de son côté et ligne, à l'exception toutefois des intérêts, fruits et revenus des dits biens qui entreront cependant dans la dite communauté.*"

The community, therefore, which subsisted between the Respondents was, to use the language of the Civil Code (see Pt. IV., c. 2) not "legal," but "conventional," the effect of a legal community being qualified by the important stipulation that the moveable property which had come or might thereafter come to either consort by inheritance, gift, or testamentary disposition, was not to fall, as by operation of law it would fall, into the community. It follows that the share in Madame *Evanturel's* succession which

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was claimed by the Respondents in the former suit was a *chose* in action forming part of the female Respondent's separate estate, and that the husband could have no interest in it, except in respect of the income which, after it had been reduced into possession, might accrue therefrom and from time to time fall into the community. A suit to enforce such a claim would, *primâ facie*, appear to be the suit of the wife, though the law required that, like other suits in respect of her separate property, it should be brought with the sanction of the husband, and that he should join in it for the sake of conformity. Nor have any of the Canadian Judges taken a different view of it. Mr. Justice *Taschereau* does not seem in either of his judgments to have touched this point. Mr. Justice *Badgley*, who gave the judgment of the majority of the Court of Queen's Bench, speaking of this former action, says, "The female Appellant, assisted by her husband for conformity, sued her brother by an action '*en pétition de hérédité.*'" Mr. Justice *Caron* and Chief Justice *Meredith* expressly treat this action as a breach of the condition, the latter holding that an action in that form must have been in the contemplation of the testatrix, inasmuch as the will was made after the Respondent's marriage. It is, however, suggested that the action, though technically and ostensibly that of the wife, was, in fact, instituted by her husband in her name, against her will, and that she is, therefore, not responsible for it. If it be true that her name was used without her knowledge or against her will, or that she was not a free agent in the proceedings taken ostensibly by her, but a person acting under the compulsion of her husband, that case ought to have been established by evidence. But there is nothing to shew that she was not a free agent in the proceedings so taken, proceedings which, if successful, would certainly have been for her benefit. She was examined in the course of the suit; she admitted that she was the Plaintiff or one of the Plaintiffs; she took no step to repudiate the claim made in her name; and the solitary circumstance from which an inference that she did not herself dispute the testament is drawn is, that when examined as a witness she admitted that at the date of the will her mother had sufficient intelligence to make a testament.

Another point to be considered is the nature of the proceedings taken to dispute the will. It is said (and this assumption is the

foundation of the judgment which Mr. Justice *Badgley* delivered on behalf of himself and the Judges who concurred with him) that although the will was originally disputed on the grounds of fraud and captation, as well as on that of its informal execution, the former grounds must be taken to have been abandoned, and the testament to have been really disputed only upon the objections to its due execution which were raised by the "*inscription en faux*." The Respondents, however, after the order of remand of the 20th of September, 1865, disputed the will on the issues of fraud and undue influence; they appealed from the adverse decision on those issues from the Superior Court to the Court of Queen's Bench, and from the latter Court to Her Majesty in Council; and in the printed case filed by them as Appellants in the Privy Council, insisted upon all the grounds on which the will was originally disputed. The suggested abandonment, therefore, rests wholly on the fact that, on the hearing of that appeal, their learned counsel, exercising therein a sound discretion, declined to argue the issues of fraud and undue influence, on which, being questions of fact, he had the concurrent judgments of the two Canadian Courts against him. Mr. Justice *Badgley*, indeed, cites a text of *Forsyth*, to the effect that, if the contesting party desists from his objection before "*jugement définitif*," he does not incur the penalty. The fallacy of the learned Judge's argument consists in treating the Order of Her Majesty in Council as the first definitive judgment. The decree of the Superior Court on the trial of these issues of fraud and captation would clearly have been a definitive judgment if the Respondents had not themselves protracted the contest by going first to the Court of Queen's Bench and afterwards to the Privy Council. A party cannot put himself in a better situation by prolonging vexatious litigation than that in which he would have been, had he submitted to the first judgment against him.

Their Lordships are, therefore, of opinion, that the former action must be taken to have been the action of the female Respondent, and that she must be taken to have therein disputed the will, not only upon the objections to its execution raised by the "*inscription en faux*," but also upon the grounds of fraud and undue influence."

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The legal effect and validity of the conditional or penal clause are now to be considered.

It has been argued that this particular clause is so vaguely expressed that it should be held to be void for uncertainty. Their Lordships cannot accede to this argument, which seems to be principally founded on the words, "*faire, soit directement ou indirectement, aucune démarche quelconque pour contester mon présent testament.*" The terms, though general, seem to their Lordships to point to a contestation of the testament in a Court of Law, and to be made so general in order to embrace every form of legal proceeding wherein or whereby such contestation might take place. There is, therefore, no such uncertainty in the clause as might prevent its application.

A graver question raised is, whether the law permits or will give any effect to such a claim.

The reasons assigned in the formal judgment of Mr. Justice *Taschereau*, of the 6th of May, 1871, for treating the clause as "*non-écrite*," may be shortly stated as follows:—

1. That in the circumstances of the case such a clause is contrary to public order ("*l'ordre public*"), inasmuch as the law requires the observance of certain formalities in the execution of wills, the testable capacity of the testator, and the absence of fraud and undue influence; and the strict application of such a clause would favour the non-observance of what the law requires and the commission of what the law forbids by deterring persons from disputing wills which on one or other of the above grounds ought to be declared void.

2. That such a clause, unless under exceptional circumstances, and in the absence of probable or reasonable cause for disputing the disposition, ought to be considered as inserted only *in terrorem* and deemed to be comminatory.

3. That the Respondents, in contesting the will, had not acted in the spirit of chicanery, but had a just and probable cause for suspecting the validity of the will and requiring it to be proved by legal proceedings; and that the application or non-application of such a clause is in the discretion of a Court of Justice, to be exercised upon its view of the whole of the matters in dispute—"*l'ensemble du litige.*"

4. That in the opinion of the Court, it was not the intention of the testatrix to deprive her daughters of their small legacies if they disputed the very valuable gift to their brother, on all or any of the grounds upon which the validity of the testament was in fact disputed, but only in the event of their disputing the justice of the distribution which she made of her property, and in particular the clause by which she discharged her son from the liability of rendering any account as her agent.

The formal judgment of the Court of Queen's Bench, in support of the conclusion that "the clause, under the circumstances of the case, and considering the nature of the contestations of the testament by the Respondents, ought to be deemed '*non-écrite*,'" adopts and specifies the second and third of the above reasons. It is to be observed, however, that this document, which is the judgment under appeal, does not expressly declare the clause to be contrary to "*l'ordre public*," though many of the reasons given by Mr. Justice *Badgley*, in the judgment delivered by him, seem to favour such a conclusion; and further, that the words "*vu la nature de la contestation du dit testament*," taken in connection with the judgment delivered, make it uncertain how far the final judgment of the Court of Queen's Bench proceeded on its erroneous view of the supposed abandonment of the grounds of fraud and undue influence which has already been adverted to.

The 760th Article of the Code Civil (by which it is agreed on all hands that this case is governed) is in these words: "Gifts, *inter vivos*, or by will, may be conditional. An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts. In a will, such a condition is considered as not written, and does not annul the disposition." This clause must be read in connection with the 831st, which declares that "every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

It appears to their Lordships that these Articles suffice to dispose

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of several of the conclusions on which the judgments under appeal have been shewn to be founded, of much of the reasoning of the learned Judges in support of those conclusions, of many of the authorities cited at the Bar from ancient French writers, and of the arguments founded on those authorities.

For example, these articles of the Code, of which the terms are, in substance, hardly distinguishable from those of the texts of *Justinian*, leave no ground, if ground there ever were, for the proposition repudiated, as *Merlin* (*titre "Peine Testamentaire"*) shews by the best authorities that the *Theodosian Code* and therefore the Law of the *Antonines* on this point ought to prevail over that of *Justinian* in countries governed by the *Code of Paris*. They also sweep away all the fine distinctions between penal and purely conditional dispositions which civilians have founded on the motives, real or supposed, of testators. But they do more. By declaring that a testator may impose upon his gift any condition not prohibited by the Code, and not contrary to law, public order, or good morals, they seem to cast upon Courts of Justice the duty of giving effect to all conditions, which do not fall within the above exceptions, according to the plain meaning and intention of the testator, to be collected from his language. This consideration would dispose not only of the fourth, but of the second and third of the above-mentioned grounds for Mr. Justice *Taschereau's* original judgment. Of the fourth, it may be remarked, that it proceeds on one of those forced constructions of a testament which are tantamount to the making of a new will for the testator; and that it would in effect make the whole clause nugatory, since it would be idle to dispute particular clauses in a will duly executed by a testator of undisputed capacity, having a testamentary power over the subject matter disposed of, on the mere ground of the alleged injustice or unfairness of the disposition.

The second and third of the above-mentioned reasons being those adopted by the Court of Queen's Bench, are closely connected together. It is stated by *Merlin* (*Répertoire de Droit*, vol. ix. p. 227, *titre "Peine Testamentaire,"*) that little effect is given in practice to clauses of this kind; that "*Paul de Castres* and a number of other authors regard them as purely comminatory; so that the penalties which they prescribe are not incurred as of absolute right

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by a breach of the condition, but are inflicted only in the very rare cases in which the suits brought by those whom the testator has forbidden to bring them, are found to have no other foundation than a spirit of calumny and vexation."

This implies, not that the condition is in itself unlawful, or against public policy, but that either by an arbitrary rule of construction it is to be taken to import, however general may be its language, that the testator intended only to forbid the contestation of his will upon frivolous and vexatious grounds, or that there resides in the Court of Justice a discretionary power of giving or refusing to give effect to it, according to their view of the motives and conduct of those who shall be found to have infringed its letter.

There is nothing in the Code to warrant either of these propositions. The latter seems to rest upon the practice of the old French Parliaments; but the sort of dispensing or qualifying power so claimed and exercised by them has been condemned by the best Jurists, and repudiated in the Courts of *Lower Canada*, as is shewn by the authorities (1) cited by Chief Justice *Meredith*, and in the notes of Mr. Justice *Caron's* judgment. And as the decisions of Courts claiming to exercise this anomalous power are the foundation of the rule of construction assumed in the former of the two propositions, and the rule itself is opposed to the ordinary principles of construction, their Lordships think that that also, if it ever existed, must be treated as obsolete; and that in order to support the judgment under appeal the condition in question must be shewn to fall within the exceptions expressed by the Code, as being impossible, or contrary to good morals, to law, or to public order.

Impossible, or contrary to good morals, it clearly is not; it is not prohibited by any positive law; the disposition which it is designed to protect is neither contrary to law nor public order, since the testatrix had an absolute power of disposition over her whole

(1) Those authorities are *Furgole*, vol. iv. p. 213, 214, in reference to *Ricard*, vol. i. p. 3, No. 1548. *Merlin's Répertoire de Juris.*, vol. xxiii. p. 115, tit. *Peine Test.* No. X. The cases referred to by the Canadian judges are *Gagnon* v. *Paradis*, No. 213 of 1810; *Hunt* v. *Joseph*, vol. ii. Rev. de Leg. p. 52, *Montreal*, S. C.; *Brousseau* v. *Desjardins*, 27 Sept. 1858; *Richard* v. *Fabrique of Quebec*, 5 L. C. R. 3; *McNevin* v. *Board of Arts*, 12 L. C. R. p. 335.

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estate; and the question is, therefore, reduced to this, viz., Is this clause contrary to public order, because it is designed to prevent the doing of that which it is against public order to discourage? In considering this question their Lordships will treat "public order" as identical with what in this country is termed "public policy," though the latter is perhaps the larger of the two terms. And they must deal with the proposition laid down by Mr. *Bowring*, and indeed involved in the judgment of Mr. Justice *Taschereau*, viz., that every condition which implies the prohibition to dispute a will as a whole, as distinguished from a particular clause in it, upon any grounds which affect the legal validity of the instrument as a testamentary disposition, sins against public order, and must be treated as "*non-écrite.*" They must do this because as they have already shewn there is no ground for treating, as the majority of the Judges of the Court of Queen's Bench have treated the Respondents, as having contested the validity of the will merely on the grounds taken by the "*inscription en faux,*" and also because there does not seem to be, in principle, much reason for the distinction taken by those learned Judges. For if society has an interest in securing the trial of the question whether all legal formalities have been observed in the execution of a will, it seems to have an equal interest in the trial of the question whether a will has been obtained by fraud, or the exercise of undue influence from a person of imperfect capacity.

The question may be considered on principle and on authority. Upon principle, it is to be observed that the prohibition cannot be absolute, and can be invoked only where the validity of a will has been unsuccessfully contested. If there be a clear and patent defect in the formalities attending the execution of the instrument, or if the incapacity of the alleged testator be clear and notorious, the heirs or other parties interested will, of course, contest the will, and, contesting it successfully, will set it aside with the clause of forfeiture. On the other hand, it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee, "I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the validity of

my will if you please; but you will do so at the peril of losing, if it be established, what it gives you."

Then, is this view of the question opposed to the authorities?

The French authorities (1) are reviewed at great length by Chief Justice *Meredith* on the one side, and Mr. Justice *Badgley* on the other.

The result of them seems to be—

First. That such a clause would unquestionably be a *conditio rei non licitæ*, and therefore of no effect, if it were designed to protect a disposition contrary to public order; which is not here the case.

Secondly. That in the ancient jurisprudence there may be found texts which favour either side of the question, whether effect ought to be given to such a clause, when it goes to prohibit the contestation of the will as a whole; and some authorities which seem to recognise a distinction between contestations founded on the non-observance of the formalities for the execution of wills, and contestations upon other and more general grounds. But,

Thirdly. That it is clearly established in *France*, by the concurrence of the best modern text-writers, and the decided cases, that such a condition is not contrary to law; and will be applied if, on any ground, the will be disputed unsuccessfully; or, in other words, that the party disputing it does so at his own risk and peril.

Upon the second point it is, however, to be observed that one, at least, of the most important authorities cited by Mr. Justice *Badgley*, is capable of an explanation which would bring the case supposed within the first category. He cites from *Furgole*, the following passage:—"*Si dans un testament qui est nul par quelque défaut de formalité le testateur dit, 'Je veux que mon testament soit exécuté, et si quelqu'un de mes successeurs légitimes l'attaque pour le faire casser, j'institue héritier un tel hôpital,' une telle disposition sera nulle et inutile quand même par quelque privilége de l'héritier institué, en cas de contravention, le testament ne manquerait d'aucune formalité, pour le faire valoir à son égard.*" It is obvious that this is a case in which the testator, having no original intention of bounty towards the hospital, makes the hospital, which under

(1) See *ante*, pp. 4, 10.

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a special law was capable of taking under an informal will, his heir, in the event only of his legal heirs disputing the dispositions of his will, on the ground of its informal execution. The object, therefore, of the condition is to enable the real objects of his bounty to take under an instrument which the law declares to be invalid, and so to protect a disposition contrary to public order.

The Respondents meet the modern authorities by saying that, as they consist of the texts taken from the works of commentators on the *Code Napoléon* and the decisions of the French Courts since the promulgation of that Code, they have little or no application to the present case. They are certainly not authorities which bind the Courts of *Canada*. But they seem to their Lordships to be, nevertheless, extremely valuable aids towards the right determination of the question whether the clause under consideration is contrary to public order. The question is certainly not conclusively determined by the ancient authorities. On this point it is sufficient to observe that *Ricard* himself, who is one of those most in favour of the Respondents, admits that a penalty is allowable when designed to defend a lawful disposition, although he goes on, in Article 1548, to shew that the penalty is often, though not always, treated as comminatory. And the very fact that, under the old system, Courts of Justice exercised a discretionary power in the application of such clauses, shews that they were not absolutely void, or (in French phrase) to be deemed "*non-écrites,*" as being contrary to law or public order.

We find, then, the modern French jurists, whether writing as commentators or actually administering justice in the Courts of law, dealing with the question whether, after the old discretionary jurisdiction had been exploded, and the law reduced, as in *Canada*, to a written code, such a condition is contrary to law. They have solved that question in the manner above stated ; and the solution is, in their Lordships' judgment, agreeable to reason. The phraseology of the French Code differs only from that of the Canadian Code in that it does not use the words "*ordre public,*" but declares only that conditions shall be "*réputées non écrites*" if "*impossibles ou contraires aux lois ou aux mœurs.*" "*L'ordre public*" is, however, only the spirit or policy of the law, and the phrase is still used in some of the modern French cases when the question is whether

the disposition to be protected is *res licita*. *Demolombe*, too (tom. xviii. p. 319, art. 287), after stating that the penal clause is applicable to the heir who fails in his contestation of the testament, says expressly, "*Et telle est, en effet, la doctrine qui nous paraît devoir être admise, lorsqu'il s'agit d'une action en nullité*, qui était fondée sur un motif d'ordre public."

It was well observed during the argument that the determination of what is contrary to the so-called "policy of the law" necessarily varies from time to time. Many transactions are upheld now by our own Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. And in dealing with the question before them, their Lordships think that very great weight is due to the opinions and decisions of modern French jurists.

Though the question is one to be determined by the law of *Lower Canada*, and not by that of *England*, their Lordships think it right to say something upon the English authorities which have been cited before them.

There are undoubtedly *dicta* and even decisions in some of the earlier cases to the effect that conditions of this kind were to be held to be *in terrorem* only, and, in the language of the *Touchstone*, "against the liberty of the law." But, in the case of personal legacies, effect was given to the condition if there was a gift over on the breach of the condition. The whole law on this subject appears to their Lordships to have been considered and put upon a sound foundation by the Court of Exchequer in *Cooke* v. *Turner* (1) upon the case sent to them by the Court of Chancery. It was suggested at the Bar that that ruling was not acted upon by the Court of Chancery in the particular case. But, from the report of that case in the 15th volume of *Simon's* Reports, it appears that, though pressed to send the case before another Court of Law, the Vice-Chancellor of *England* declined to do so, but directed, in the interest of the unborn issue of a marriage, an issue so framed as not to involve the forfeiture by the legatees of their

(1) 15 M. & W. 727.

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legacy under the clause assumed to be valid. The case of *ex parte Dixon* (1), which was decided by Lord *Cranworth* as Vice-Chancellor, after his judgment in *Cooke* v. *Turner* (2), is supposed to conflict with the latter. But it does not really do so. No doubt the learned Judge says of such conditions as the present that they had been "considered (whether justly or not it is unnecessary to inquire) as contrary to the policy of the law." But he was not in any way called upon to decide that question; he was dealing with a condition of a very different kind, to which he gave effect. The real effect of his judgment is only that, if the condition be *conditio rei licitæ*, it ought to be enforced. It does not affect the authority of *Cooke* v. *Turner* (2).

Upon the whole, their Lordships have come to the conclusion that the preponderance of authority, as well as principle, is in favour of the judgment of the Superior Court on review, and they will humbly recommend Her Majesty to reverse the judgment of the Court of Queen's Bench, and to affirm the judgment of the Superior Court, with the costs incurred in the Court of Queen's Bench, and those of this Appeal.

Solicitors for the Appellant: Messrs. *Bischoff, Bompas, & Bischoff.*

Solicitors for the Respondents: Messrs. *Clark, Son, & Rawlins.*

(1) 20 L. J. (Ch.) (N.S.) 33. (2) 15 M. & W. 727.

L'UNION ST. JACQUES DE MONTREAL . DEFENDANT;

AND

DAME JULIE BÉLISLE . . . . . PLAINTIFF.

J. C.*
1874
July 8.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH IN LOWER CANADA, IN THE PROVINCE OF QUEBEC (APPEAL SIDE).

Distribution of Legislative Power—Legislature of Quebec.

Held that the Act of the Provincial Legislature of Quebec (33 Vict. c. 58), which purported to relieve by legislation the appellant society, appearing on the face of the Act to have been in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

The Act related expressly to "a matter merely of a local or private nature in the province," which, by the 92nd sect. of the *British North America Act*, 1867, passed by the Imperial Parliament, is assigned to the exclusive competency of the provincial legislature; and does not fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the last mentioned Act reserved for the exclusive legislative authority of the Parliament of Canada.

THE question decided in this appeal was whether the Act of the provincial legislature of *Quebec* (33 Vict. c. 58), is repugnant to the provisions of an Act of the Imperial Parliament, viz. the *British North America Act*, 1867. The Provincial Act, 33 Vict. c. 58, is as follows:—

"An Act to relieve *L'Union St. Jacques de Montreal.*

"Whereas there exists in the City of *Montreal* a benefit and benevolent society, duly incorporated, under the name of '*L'Union St. Jacques de Montreal*;' whereas the contributions levied on the members of such society are too limited, and the benefits, especially those granted to the widows of deceased members, are by far too high; and whereas such disproportion between the contributions and the benefits has already reduced considerably the resources of the said society, remarkably encroached on its savings, and prevented the balancing of receipts and expenses, the latter having exceeded the former for more than three years; whereas the half of

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the widows of deceased members, to wit, two out of four, have understood such state of affairs, and have come to the relief of the said society by agreeing to allow their weekly and life benefits to be lessened, and to exchange the same against the allowance of a sum to be once paid, and having not exceeded $200 except for such of them who had not already received as such an equal sum of $200; whereas it would be unjust and altogether injurious to the interests of the said society to continue to pay weekly and life benefits to the two widows having refused to comply with the terms offered to the other widows and by them accepted; and whereas the said two widows persisting in their refusal have already received in the way of ordinary benefits, a sum exceeding that of $200; whereas it has been shewn that the financial condition of the said association does not permit of its continuing to pay to the two widows aforesaid their previous pensions, which, even if it were disposed, it could not do without entailing its own ruin; whereas the Act incorporating the said society does not allow to decree that the terms accepted by the two widows aforesaid shall be binding for all the widows of its deceased members; and whereas it is expedient to remedy such unfavourable state of affairs, as prayed for by the petition of the said society, and whereas it is just that the prayer of the said petition be granted; therefore, Her Majesty, by and with the advice and consent of the Legislature of *Quebec*, enacts as follows:

"I. The said society, '*The Union St. Jacques of Montreal*,' is hereby authorized to convert, in the ordinary manner and forms of its proceedings, the benefits of the said two widows, to wit: Dame *Elizabeth Brunet*, widow of the late *Albert Tessier*, and Dame *Julie Bélisle*, widow of the late *Prosper Tourville*, into the sum of $200 to be once paid to each and all of them.

"II. If the said two widows, or one of them, refuse to accept such sum, instead of their or her prior benefit, it shall be lawful for the said society to keep such sum or sums in trust, and they shall only be bound to pay the said widows, for all the benefits to which they were previously entitled, the legal interest on the said sum of $200, that is to say, $12 to each of them, the said interest payable monthly and in advance up to their re-marriage or till their death, if they remain in a state of widowhood; it shall, nevertheless,

be lawful for the said widows to draw the said allowance of $200 each, provided, of course, that they shall ask for it while in a state of widowhood.

"III. But if the said association, '*L'Union St. Jacques de Montreal*' sees its condition improve, and becomes possessed of assets, amounting to $10,000 in real estate, or in savings deposited in banks or otherwise invested, it shall be permissible to the two widows above named to demand from the said association the same contribution as heretofore (7*s.* 6*d.* per week), and also all arrears from this date, after deduction has been made of the $200 and the interest received by them on the same."

Under the Imperial Act *The British North America Act*, 1867, sect. 3, the provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, form one dominion under the name of *Canada*, and under sect. 5, *Canada* is divided into four provinces, viz., *Ontario*, *Quebec*, *Nova Scotia*, and *New Brunswick*. A Parliament for *Canada* called the Dominion Parliament consisting of the Queen the Senate and the House of Commons is thereby established, and by sect. 71, a legislature for *Quebec* was established consisting of the Lieut.-Governor and of two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec*.

The material sections of the Imperial Act which effected the distribution of legislative power as between the Dominion Parliament and the local legislature, are the 91st and the 92nd. By the former, so far as is material to this case to refer to it, it was provided that it should be lawful for the Queen, with the advice and consent of the Dominion Legislature, to make laws on all subjects not coming within the class of subjects by that Act assigned exclusively to the legislature of the province, and for greater certainty, it was declared that the exclusive legislative authority of the Parliament of *Canada* should extend to all matters coming within certain classes of subjects, to wit, *inter alia*, bankruptcy and insolvency; and that any matter coming within the said classes of subjects should not be deemed to come within the class of "Matters of a local or private nature" mentioned in the next section. By the latter, it was provided that in each province the local legislature might exclusively make laws in relation to matters coming within certain classes of subjects therein mentioned, to wit,

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inter alia: 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals. 11. The incorporation of companies with provincial objects. 13. Property and civil rights in the province. 16. Generally all matters of a merely local or private nature in the province.

The question arose in this way. The Respondent, on the 25th of August, 1870, sued the Appellant Society in the Circuit Court for the district of *Montreal*, to recover an instalment of an annuity to which she was admittedly entitled under the rules of the society. By special plea, the Appellant pleaded that by the Provincial Act above set out it was authorized to pay to the Respondent the sum of $200 in lieu of the benefits which she was entitled to receive from the society, and if she refused to accept it to place the sum in deposit, and pay to the Respondent the interest, viz. $12 a year monthly in advance during her life, or till her second marriage; and that the society had, at a general meeting, on the 10th of March, 1870, resolved to avail itself of the Act, and that it had always been ready and willing to pay the arrears to that date. The Respondent answered, that the Provincial Act should be declared illegal and unconstitutional. The Judge, on the 30th of November, 1870, gave judgment overruling the Appellant's plea, which judgment was affirmed on the 20th of September, 1872, by the Court of Queen's Bench (*Duval*, C.J., *Drummond* and *Monk*, JJ., *Caron*, and *Badgley*, JJ., dissenting). The majority of the Judges considered that the provincial legislature in passing the Provincial Act, had legislated on a matter coming within the class of "insolvency," which belonged under the 91st section of the Imperial Act to the exclusive authority of the Parliament of *Canada*.

Sir *W. Harcourt*, Q.C., and Mr. *Bompas*, for the Appellant.

Mr. *Benjamin*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

The sole question in this appeal is this: whether the subject matter of the Provincial Act (33 Vict. c. 58), is one of those

which by the 91st section of the Dominion Act are reserved exclusively for legislation by the Dominion Legislature. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section are reserved for the exclusive legislation of the Parliament of *Canada*, called the Dominion Parliament; but beyond controversy there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the provincial legislature in each province. Among those the last is thus expressed: "Generally all matters of a merely local or private nature in the province." If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict. c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of *Montreal* within the province, which appears to consist exclusively of members who would be subject *primâ facie* to the control of the provincial legislature. This Act deals solely with the affairs of that particular society, and in this manner:—taking notice of a certain state of embarassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private; clearly it is local, so far as locality is to be considered, because it is in the province and in the city of *Montreal;* and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated; because the last and concluding words of

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sect. 91 are: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." But the *onus* is on the Respondent to shew that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, "Bankruptcy and Insolvency;" and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice *Caron* when he speaks of the general laws governing *Faillite*, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. *Benjamin*, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been

passed by the Dominion Legislature, it would have been beyond their competency: nor that, if it had been so passed, it would have been within the competency of the provincial legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the province upon the sea coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the province of *Quebec* might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land, and therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That, their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not termi-

J. C. 1874 L'UNION ST. JACQUES DE MONTREAL v. BÉLISLE.

nate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Court of Queen's Bench (*Canada*) ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

Solicitors for the Appellant: Messrs. *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondent: Messrs. *Wilde, Berger, Thorn, & Wilde.*

J. C.* 1874 *June* 25.

JOHN BENJAMIN LEE . . . . . APPELLANT;

AND

JOHN FAGG AND EDWARD MUMMERY . RESPONDENTS.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Pleadings—Monition—Interest of Promovent.

Where a monition issued by the Commissary-General of the diocese of *Canterbury* to an incumbent and churchwardens, ordering them to remove certain ornaments from their church unless they should shew cause to the contrary, did not disclose on the face of it any interest in the suit on the part of the promovent, and such defect was insisted upon by the churchwardens in shewing cause against the same:—

Held, that the Judge of the Court of Arches was right in directing that the suit should be dismissed, with costs as against the churchwardens.

Such a suit is a civil suit, and is not open to every one, even with the consent of the ordinary, but only to those who have an interest in it.

ON the 24th of March, 1873, a monition (1) and citation under seal of the Commissary Court of *Canterbury* was issued at the petition

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) See Law Rep. 4 A. & E. p. 135.

of the Appellant to the Reverend *Charles Joseph Ridsdale*, clerk, incumbent of the parish and church of *St. Peter, Folkestone*, in the county of *Kent*, and the above-named Respondents, the churchwardens thereof, to remove, or cause to be removed, certain representations of figures in coloured relief, of plastic material, representing scenes of Our Lord's Passion, attached to the walls of the said church, and commonly called Stations of the Cross and Passion, or to appear and shew cause why the same should not be removed on the ground that the said stations had been placed in the said church without any faculty having been granted for placing the same there.

On the 26th of May, 1873, the Respondents appeared and prayed that they be dismissed from the suit with costs, on the ground that the Appellant did not shew on the face of the monition any interest in the matter complained of, either of a public or private character. The Judge, by interlocutory decree (the 9th of June, 1873), rejected the said prayer; but, on the 14th of November, 1873, the Official Principal of the Arches Court of *Canterbury* reversed the Judge's decree, and dismissed the Respondents from the suit with costs as prayed (1).

Dr. *Deane*, Q.C., and Mr. *H. Cowie*, for the Appellant, contended that it was unnecessary that the promovent should have any special or private interest in the subject-matter of the suit or any interest other than that of maintaining public order and of enforcing obedience to ecclesiastical law. It was further unnecessary that he should have the status of a parishioner of the said church, or should have sustained any civil injury in respect of the subject-matter of the suit. The proceeding was entirely *ad publicam vindictam*. Even if the promovent must have a special or private interest, the same need not appear on the face of the monition and citation. They cited *Duke of Portland* v. *Bingham* (2), where the Duke of *Portland* shewed no interest; *Line* v. *Harris* (3); *Hopper* v. *Davis* (4); *Beal* v. *Liddell*, *Westerton* v. *Liddell* (5); *Millar* v. *Palmer* (6). [SIR B. PEACOCK:—Suppose the promovent had no

(1) See *Fagg* v. *Lee*, Law Rep. 4 A. & E. p. 135.

(2) 1 Hagg. Cons. 159.

(3) 1 Lee, 146.

(4) 1 Lee, 640.

(5) Moore's Special Rep. 1857; and see *Liddell* v. *Beal*, 14 Moore's P. C. Cases, 1.

(6) 1 Curtis, 540, 549.

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civil remedy, is he not entitled to a monition? Is a monition necessarily the commencement of a civil proceeding?]. This is neither a civil nor a criminal suit. It is a *tertium quid*, which seeks an order to explain to the ordinary the state of the diocese —to call on him to fulfil a public duty.

Dr. *A. J. Stephens*, Q.C., and Mr. *W. G. Phillimore*, for the Respondents, contended that there was no authority in principle or precedent for the *tertium quid* theory started on the other side. The Appellant did not appear, from the monition, to be a party aggrieved by the acts complained of, nor to have any connection with the parish or diocese. It was a civil suit, open only to those who had a personal interest in it, and there is no precedent of a monition in a civil suit not shewing an interest. The monition must be strictly construed, and it cannot be presumed on behalf of the promovent that any sufficient interest existed which he has not stated. They cited *Turner* v. *Meyers* (1) and *Reg.* v. *Bishop of Chichester* (2).

Dr. *Deane*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case an application was made to the Commissary-General of the diocese of *Canterbury* for a monition to be issued to the Rev. *Charles Joseph Ridsdale*, the incumbent of the parish of *St. Peter's, Folkestone*, and the churchwardens, ordering them to remove certain ornaments called stations from their church, unless they could shew cause why such ornaments should not be removed. The application for this monition appears to have been made by a gentleman described as Mr. *John Benjamin Lee*, of No. 2, *Broad Sanctuary*, in the city of *Westminster*, and their Lordships cannot take cognisance of any other description of that gentleman. Mr. *Lee* does not state that he has any interest in the suit. The rector did not appear, but the churchwardens, upon the day appointed by the Commissary-General for holding a Court to make an order in the matter, insisted that the suit should be dismissed,

(1) 1 Hagg. Cons. 414. (2) 2 E. & E. 222.

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on the ground that the monition did not shew that Mr. *Lee*, the promovent of the suit, had any such interest as would entitle him to maintain it. The learned Commissary-General overruled this objection, whereupon an appeal was preferred to the Court of Arches. The Judge of the Court of Arches reversed the judgment of the Commissary-General, and directed that the suit should be dismissed as against the churchwardens, with costs.

4 Q B D 8

The first question which arises in the case is, whether it is in point of law necessary that the promovent of a suit of this description should have an interest in the subject of it? On this question the learned Judge of the Court of Arches observes: "In the Ecclesiastical Court there are two kinds of suits, civil and criminal. The criminal suit, which is the promotion of the office of the judge, that is, of the ordinary, is open to any person whom the ordinary may think fit to allow to promote his office by the institution of a criminal suit; such a suit is '*ad publicam vindictam*,' and in some sense concerns every member of the church. The civil suit is not open to everyone, even with the consent of the ordinary, but only to those who have a personal interest in it;" and the learned Judge proceeds to rule that this suit comes within the latter description. Their Lordships are of opinion that the learned Judge was right.

It has been contended, indeed, at the bar that there is in the Ecclesiastical Courts a certain third class of suits, not very accurately defined, but designated generally as a *tertium genus*, partaking partly of the character of civil suits and partly of the character of criminal suits, and that this suit is one of that *tertium genus*, but no sufficient authority and no sufficient argument founded upon principle has been adduced to induce their Lordships to affirm the existence of this class of suits, or, if it exists, that the present suit belongs to it.

Their Lordships find the law on this subject laid down by Lord *Stowell* in a case which has been quoted, *The Duke of Portland* v. *Bingham* (1), in which he lays down the distinction between criminal and civil ecclesiastical suits, without alluding to any supposed third class of suits, in these terms:—"There are other interests in which every man partakes, such as that of maintaining public

(1) 1 Hagg. Cons. 157.

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order, &c. These are clear, direct, and universal, and will entitle any one to institute proceedings to preserve that order. But such proceedings must be *ad publicam vindictam* and by criminal articles exhibited in due form, which is the usual way of trying such matters as the present, and the most convenient. In that case the question would be reduced to one point only—the right of the party who is the object of such proceedings, whereas in civil suits a previous question may arise of equal difficulty on the right and title of the person instituting the suit. This, then, is an important distinction." Their Lordships, therefore, have come to the conclusion that it is necessary in point of law to enable Mr. *Lee* to maintain this suit that he should have some interest in it.

This being so, the questions which remain are purely questions of pleading and practice in the Ecclesiastical Courts. The first pleading question which arises is whether it is necessary that the monition should shew the interest of Mr. *Lee* upon the face of it; and, secondly, whether, if the Defendants are entitled to object to his want of interest, they have objected to it at the proper time and in the proper manner?

It has been said that citations in suits of this kind have usually not set out the interest of the promovent of the suit, some cases have been cited upon the subject, and reference has been made to *Conset's* Book of Practice, in which, although (as far as their Lordships understand) no precedent is actually set out of a form of citation or a form of monition, still the requisites of a citation are described. Those requisites are first, the name of the Judge, his commission, and style; secondly, the name of the party cited; thirdly, the day and place where he must appear; fourthly, the cause for which the suit is commenced; fifthly, the name and address of the party at whose instance the citation is obtained; and sixthly, the residence of the Defendant; and it is argued that this enumeration excludes the notion that the interest of the promovent of the suit should appear in the citation. It appears, however, to their Lordships that that part of the citation which shews "the cause for which the suit is commenced," would probably be defective unless it shewed the interest which the promovent had in it.

Some cases were then referred to in which it has been contended that no interest was set out in the citation, but those cases do not appear to their Lordships to bear out that contention. In *Duke of Portland* v. *Bingham* (1) it is said, "This is a case arising upon a decree taken out by the Duke of *Portland*, as lay rector, impropriator, and parson of the rectory and parish of *St. Marylebone*, against Dr. *Bingham*, citing him to appear and bring in a license granted by the Bishop of *London*, authorizing him to perform the office of joint Sunday preacher in a chapel in *Quebec Street*, in the said parish." It seems from this citation that the Duke of *Portland* did allege an interest, and the question subsequently raised by an act on petition was whether the interest he had set out was or was not sufficient. Then, again, in *Line* v. *Harris* (2) it would appear, from the short report of the citation, that it did shew some interest on the part of the promovent. "Mr. *Harris*, the vicar of *St. Stephen's*, took out a citation to call *Line* to answer in a cause of invading and encroaching on *Harris's* office by officiating in this chapel without his leave." Possibly, if the citation had been set out in full, the nature of his interest would have more clearly appeared. Again, in the case of *Hopper* v. *Davis* (3) some interest was stated on behalf of the churchwardens. Be this as it may, it is to be observed that a citation only calls upon the Defendant to appear, and then the proceedings take the ordinary course of libel and allegation, and so on. This suit is commenced not merely by citation, but by monition also. The Defendant is not only called upon to appear, but to do a certain act, or to shew cause why it should not be done. A monition is by no means a process of the Court to be issued like a citation as a matter of course, but is granted on application in the exercise of judicial discretion, and in the absence of cause shewn becomes an imperative order. If therefore it were clear that a mere citation need not shew an interest, it would by no means follow that a monition need not. As far as their Lordships are able to collect, this mode of proceeding, although it may not be altogether novel, has been more frequently adopted recently than in former times. According to the statement of the Dean of the

(1) 1 Hagg. Cons. 159. (2) 1 Lee, 146. (3) 1 Lee, 640.

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Arches, which undoubtedly is correct, no precedent is to be found of any monition not shewing an interest in a civil suit of this kind. One precedent only has been brought before their Lordships of such a monition, but that is of a very important character. It is the well-known case of *Beal* v. *Liddell* (1), in which the suit was commenced in precisely the same manner as this, and in which the interest of the promovent of the suit is set out most carefully in the monition. It may be at least inferred that their Lordships who heard that case (the Committee comprising very eminent names) were of opinion that this was proper and necessary, for Mr. *Beal* appeared before the Privy Council desiring the execution of the monition, whereupon counsel for the Defendant made an objection which was afterwards withdrawn, that Mr. *Beal* had no interest to continue the suit, although he had lawfully begun it, whereupon (according to the report of Mr. *Moore*) the Committee observe:—"The counsel for the Respondents took an objection, which they did not press, to *Beal* being heard, as he had ceased to be a parishioner or inhabitant within the district of *St. Barnabas*, and therefore had no *locus standi* in an Ecclesiastical Court. Their Lordships intimated their opinion that the objection in general law and practice was correct, and that it was only in the particular circumstances of the case, and having regard to the waiver of the objection by the incumbent and churchwardens, that *Beal* would be allowed to proceed, but that the permission granted him was not to be considered a precedent." Their Lordships seem to have entertained some doubt as to whether *Beal's* interest must not have been a continuing interest to enable him to enforce execution in the suit, but none that it was proper and necessary that his interest in the first instance should have been stated in the proceeding by which the suit was commenced.

That being so, their Lordships are clearly of opinion that it was necessary that Mr. *Lee's* interest should appear upon the monition.

Then comes the question, if the Defendants had a right to object to his interest not appearing, when and how they should

(1) 14 Moore's P. C. Cases, 1.

have objected? It is stated, indeed, by the learned Judge of the Commissary Court that in his opinion the only convenient and correct mode of raising an objection to Mr. *Lee's* interest is, either appearing under protest and calling upon him to propound his interest, or by raising it on the admission of the libel, or by the subsequent pleadings. The learned Judge of the Court of Arches speaks of three courses which were open to the Defendants. He says: "The party so cited might have taken one of three courses—he might have appeared and demanded a more formal proceeding by way of libel, or by the less formal way of act on petition, but he might also have made his defence by appearing in obedience to the monition and shewing cause against it to the Court." The learned Commissary gave notice that he would hold a Court for the purpose of cause being shewn against the monition, and he states that he held this Court with a view of making an order in the matter. Under these circumstances, the Defendants being called upon, as they properly would be, to shew cause, in their Lordships' opinion it was competent for them to shew as cause that which was fatal to the suit, namely, that the Plaintiff had no interest in instituting it.

Their Lordships are, therefore, of opinion that the judgment of the Court of Arches was right, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Proctors for the Appellant: Messrs. *Moore & Currey.*
Proctors for the Respondents: Messrs. *Brookes & Co.*

J. C.* THE REV. CHARLES PARNELL, Clerk . . Defendant;
1874
AND
Nov. 24. WALTER ROUGHTON . . . . . Promoter.

ON APPEAL FROM THE CHANCERY COURT OF YORK.

Pleading—"In a Ceremonious Manner"—"Sanctioned or permitted"—Sufficiency.

4 A. & E. 393
PD. 324-5,
331-5,

Where certain articles exhibited against a clergyman charged him with doing certain specified acts in his church "in a ceremonious manner," or "as connected with and forming part of the ceremonies of public worship":—

Held, that these words amounted to allegations of fact capable of proof, and not to conclusions of law to be drawn from facts.

The averment that an incumbent has "sanctioned or permitted" in his church any alleged departure from the course of public worship as authorized by law is sufficient, without charging that such departure was authorized by the incumbent.

An averment, following the exact words of the third rubric at the end of the Communion Service, that there has been communion, that the elements were consecrated and received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only two persons communicated with him, is a sufficient allegation of an ecclesiastical offence having been committed.

THIS suit was brought under the provisions of the Act 3 & 4 Vict. c. 86, against the Appellant, a beneficed clergyman in the diocese of *Chester*, for certain alleged offences against the Laws Ecclesiastical relating to the mode of conducting divine service; and it came before the Chancery Court of *York* in the first instance by virtue of letters of request (Nov. 24, 1873), from the Bishop of *Chester*. Fifteen articles against the Appellant were filed on behalf of the Respondent on the 29th of January, 1874, the substance of which was, so far as it is material to refer to them, as follows:—

"4. For having in his church, at the ordinary service, after the conclusion of morning prayer, and immediately before commenc-

* *Present*:—The Archbishop of Canterbury, The Lord Chancellor (Lord Cairns), The Bishop of London, Lord Penzance, Lord Selborne, Sir James W. Colvile, The Judge of the High Court of Admiralty, and Sir Barnes Peacock.

ing the Communion Service, and as connected with and being a part of the ceremonies of public worship, and in the presence of a congregation then there assembled for the purpose of divine service—that is to say, the Communion Service—formed or caused to be formed a procession, composed of himself and other clergy, and of choristers and others, accompanied by a boy bearing a vessel filled with incense, and a person carrying a large metallic cross, and by other persons bearing banners, he himself wearing a long cope or robe with a crimson velvet collar and richly embroidered in various colours, which procession went round the church in a ceremonial manner, singing a hymn, and with the incense lighted and smoking; and at the conclusion thereof such cope was taken off by two attendants, and he (the Appellant) forthwith commenced the Communion Service; and for having sanctioned or permitted the like processions in the church at the same period in the service.

"5. For having used lighted candles in his church on the communion table or on a ledge immediately over the said table during the celebration by him of the Holy Communion, and also during the performance of other parts of divine service, as a matter of ceremony, and at times when such lighted candles were not wanted for the purpose of giving light, and for having sanctioned or permitted and suffered such ceremonial use of lighted candles while such celebration and service were being performed in his church by his curate or other clergymen.

"6. For having when officiating in the Communion Service and in the administration of the Holy Communion in his church worn, as a matter of ceremony, a vestment called a chasuble, and for having sanctioned or permitted and suffered the like wearing of a chasuble by his curate and other clergymen while officiating in the church in the Communion Service.

"7. For having, when officiating in the Communion Service and in the administration of the Holy Communion in his church, worn divers ceremonial vestments and things of divers forms and colours, and with divers decorations thereon, other than and besides or instead of the habits appointed and allowed by the laws of the Church of *England* to be then worn, and for having sanctioned or permitted and suffered the wearing of such vestments and things

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as aforesaid, besides or instead of the habits appointed and allowed by law, by his curate or other clergymen, while officiating in the Communion Service in the church; the said vestments and things being so worn as matters of ceremony and ritual, and not forming part of ordinary clothing.

"8. For having during the service for the celebration of the Holy Communion in his church, and when officiating as principal minister or celebrant in such service, mixed or caused to be mixed water with the sacramental wine used in the Holy Communion, and also then administered, or caused or permitted to be administered, wine mixed with water to the communicants at the Lord's Supper; and for having sanctioned or permitted and suffered his curate or other clergymen who were so officiating in the Communion Service in the church, so to mix, or cause to be mixed, water with the sacramental wine, and also then to administer, or cause to be administered, wine mixed with water, to the communicants at the Lord's Supper.

"9. For having when officiating as the principal minister or celebrant in the service for the administration of the Holy Communion in his church, stood, while reading the prayer of consecration in the said service, at the west side of the holy table, in such wise that he then stood between the people and the holy table with his back to the people; and for having sanctioned or permitted and suffered his curate or other clergymen, who were officiating as principal ministers or celebrants in the communion service in the church, to stand, whilst reading such prayer of consecration, at the west side of the holy table, with the back to the people in the same manner.

"10. For having while officiating in his church as the principal minister or celebrant in the service for the administration of the Holy Communion elevated the paten, or bread, or wafer, for the Holy Communion, in a ceremonial manner, and in a much greater degree than by merely taking the same into his hands, as prescribed in the Book of Common Prayer, and in a much greater degree than is necessary in order to conform to any of the requirements of such book; and by having also then and there taken into his hands the cup, and elevated the same in the same ceremonial manner, and in a much greater degree than by merely

taking the same into his hands as prescribed by the said book, and in a much greater degree than is necessary in order to conform to any of the said requirements. And for having sanctioned or permitted and suffered his curate or other clergymen who were officiating as the principal ministers or celebrants in the Communion Service in the church, to elevate the paten, or bread, or wafer, and also the cup, in the same manner, and to the same degree.

"11. For having when officiating in his church in the administration of the Holy Communion made the sign of the cross by the appropriate gesture for that purpose when giving the elements to the communicants, the same being performed as and constituting a ceremony. And for having sanctioned or permitted and suffered such sign of the cross to be so made by his curate and other clergymen while administering the communion in the church.

"12. For having twice celebrated the Lord's Supper in the course of public worship and divine service in his church, and himself then consecrated and received the elements when no person communicated with him, and for having sanctioned or permitted and suffered the Lord's Supper to be celebrated by another clergyman in the church in the course of public worship and divine service, so that such clergyman himself then consecrated and received the elements when only one person communicated with him; and for having sanctioned or permitted and suffered the Lord's Supper to be celebrated by his curate in the church in the course of public worship and divine service, so that he the said curate then consecrated and received the elements when only two persons communicated with him."

13. All such ceremonies, observances, and acts being alleged to be respectively unlawful additions to and variations from the form and order prescribed and appointed.

The Appellant, on the 27th of February, 1874, filed objections (with the grounds thereof) against the admission of the aforesaid articles. The passages objected to consisted firstly of those which, as above, charged the Appellant with doing certain specified acts "in a ceremonial manner" or "as a matter of ceremony," or "being performed as and constituting a ceremony," the grounds of

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objection being, that they were embarrassing and prejudicial, and were improperly pleaded; secondly of those which, as above, charged the Appellant not for his own acts, but with permitting and suffering other clergymen to do certain acts in the church of his benefice, the ground of objection being, that they disclosed no ecclesiastical offence on the part of the Appellant; thirdly, of article 12 *in extenso*, as given above, and a passage in article 13, which summarised the contents thereof, the objection being that the allegations therein did not amount to a statement of any ecclesiastical offence.

On the 17th of April, 1874, the Judge of the Chancery Court of York (Mr. *Granville Harcourt Vernon*) gave judgment in favour of the admission of the articles subject to a verbal revision, not material to the appeal, of one article.

Dr. *Stephens*, Q.C., and Mr. *Jeune* (Mr. *W. G. Phillimore* with them), for the Appellant, contended that the articles were bad in form and in substance, inasmuch as they stated in the portions objected to matters which were not *simpliciter* facts, but which were deductions of law and involved imputations of motive: *Martin* v. *Mackonochie* (1). [THE LORD CHANCELLOR:—That case decides that it was not necessary to shew the intention there, not that the shewing it vitiated the pleading.] [LORD SELBORNE:—And assuming it to be unnecessary here, mere surplusage can be struck out.] The averment of legal conclusion is prejudicial, the facts ought to be alleged *simpliciter*. Whether a thing is done as a matter of ceremony or not is a question of inference or law, and not of fact. The pleading should be confined to things which were seen or heard. The component parts of an alleged ceremony are one thing, the inference drawn from them is another. [THE LORD CHANCELLOR:—The articles state, as matter of fact, that the proceedings complained of were part and parcel of the ceremonial proceedings of the church.] [LORD SELBORNE:—It was necessary that they should so state; whether the thing complained of was a ceremony or not is matter of fact, whether it is legal or illegal is of course matter of law]: *Martin* v. *Mackonochie* (2). Then as to the charge of having "sanctioned *or* permitted," &c., it is impos-

(1) 36 L. J. (Ecc. Cas.) 26. (2) Law Rep. 2 P. C. 365.

sible to obtain out of such language matter sufficient to create a criminal charge. It is not stated *how* the Appellant permitted or suffered, nor whether he was present or absent at the time the alleged offence was committed: *Martin* v. *Mackonochie* (1), where a charge of "sanctioning and permitting other clerks" was held too vague to be the foundation of a criminal charge. [LORD SELBORNE:—The objection there is not to the allegation alone, but to the allegations and findings being insufficient.] It is a new phrase, it ought to be "permitted *and* sanctioned." "Permit" is in legal language weaker than "authorize," and is not sufficient. They referred to *Flamank* v. *Simpson* (2). [SIR BARNES PEACOCK referred to *King* v. *Rogier* (3), where the indictment was for "permitting."] That merely followed the words of the statute. [LORD SELBORNE:—If it is right in the statute, why not also in the articles?] With regard to there only being two persons alleged to be present at the celebration, they contended that if at the time immediately before the minister says the prayer for the church militant there are then present three persons at least of discretion to receive the Holy Communion, and who remain till the saying of the consecration prayer, it is lawful for the minister to receive the Holy Communion himself, and it is lawful even if these persons do not afterwards communicate. The 12th and 13th articles, as they stand, do not allege any acts which *primâ facie* are contrary to the rubrics, or which wilfully violate the directions contained therein. [THE LORD CHANCELLOR:—The articles follow the words of the rubrics.] [THE ARCHBISHOP OF CANTERBURY:—Do you say that the rubrics cannot be violated, because there is no injunction to the minister to count the people in church?] [SIR R. PHILLIMORE:—It is competent to admit the article, and then you can shew that though the circumstances are truly set forth, yet that there was no wilful violation of the rubric.] They referred to the first paragraph of the rubric. [LORD SELBORNE:—It is a directory rubric, and no penalty is provided.] In the first Prayer Book of *Edward* VI. there was a distinct order that persons not about to communicate should leave the church.

(1) Law Rep. 2 P. C. 380. (2) Law Rep. 1 A. & E. 276.
(3) 1 B. & C. 272.

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Dr. *Deane*, Q.C., and Mr. *Benjamin Shaw*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord *Cairns*):—

Their Lordships do not desire to call upon the Respondent. The questions which are raised in this case are questions merely of pleading, and are, moreover, questions of mere technicality in pleading; and their Lordships desire it to be understood that in the advice which they will feel it their duty to tender to Her Majesty no decision will be given nor any opinion expressed on any proposition of law. Their Lordships cannot but regret that upon what is merely a question of technicality in pleading the great and, as they think, the unnecessary expense has been incurred of bringing the case at this stage before this tribunal.

The objections which are made to the articles are threefold. The first is an objection to those parts of several of the articles in which certain acts are alleged to have been done in a ceremonial manner, or as connected with and being part of the ceremonies of public worship. With regard to the introduction of those words, their Lordships are not prepared to say that the words may not be surplusage, and that the conclusion to be drawn from the other averments would not, of itself, supply the absence of these words, if they had been absent. But their Lordships cannot regard these words at the highest as more than a statement by the pleader that the acts alleged were not done in an accidental or casual manner, but were done deliberately and intentionally, and as forming part of the worship which was then proceeding. Their Lordships, in this sense, conceive that the words amount to allegations of fact capable of proof, and do not, as was said, amount to conclusions of law to be drawn from facts.

The second objection deals with those parts of the articles in which it is said that the Appellant, being responsible as incumbent for the due performance of divine service in his church, sanctioned or permitted, and, in another article, sanctioned or permitted and suffered, these acts, which are alleged to have been a departure from the course of public worship as authorized by law. It is said

that the averment should have been that the acts in question were authorized by the incumbent; but their Lordships are of opinion that the incumbent being responsible for the due performance of divine service, it is, in the first instance, at all events, sufficient to charge that departures from that order of service were sanctioned or permitted, or were sanctioned or permitted and suffered, by him, leaving it to him to allege and prove if he is able any circumstances which will shew that these acts, although actually done, had not his authority, or had not in reality his sanction or permission. Their Lordships, not finding any precise statutory enactment requiring the use of particular words, are not prepared to say that the words used in the present case are inappropriate.

The third charge remains, which is that contained in the 12th and in the 13th articles, that the Appellant "sanctioned or permitted and suffered the Lord's Supper to be celebrated by another clergyman in the church or chapel in the course of public worship and divine service, so that he himself then consecrated and received the elements when only one person communicated with him;" and also that the Appellant himself, on another day, "sanctioned or permitted and suffered the Lord's Supper to be celebrated by his curate in the said church or chapel in the course of public worship and divine service, so that he himself then consecrated and received the elements when only two persons communicated with him;" and also that on a third occasion, on a Sunday morning, the 3rd of November, and on Sunday morning, the 15th of June, 1872 and 1873, the Appellant himself "celebrated the Lord's Supper in the course of public worship and divine service, and himself then consecrated and received the elements, when no person communicated with him."

Now the two rubrics which have been referred to upon the subject of this charge, are the second and third at the end of the Communion Service: "There shall be no celebration of the Lord's Supper except there be a convenient number to communicate with the priest, according to his discretion;" "and if there be not above twenty persons," the next rubric says, "in the parish of discretion to receive the communion, yet there shall be no communion except four or three, at the least, communicate with the

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priest." Now, what their Lordships find has been done in the case of these two articles is, that, as they stand, there is an averment, following the exact words of the second of these rubrics, that there has been communion, and that the elements were consecrated and received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only two persons communicated with him. Their Lordships are of opinion that at this stage of the case, and without offering any expression of what they may think when the facts of the case come to be more closely examined, it is sufficient for the Complainant to follow the words of the rubric as he has done; and to say that there were either no persons, or not more than one, or not more than two, communicating with the priest upon the occasion in question, leaving it for the minister complained of to allege, by way of answer to this charge, anything he has to allege, either as to his having seen that there were other persons in church, as he thought, ready to communicate, and as to whom he expected that they would communicate, or any other defence that he is able to allege.

Their Lordships are of opinion therefore that there is no substance in any of the three objections made against these articles; that the judgment of the learned Judge below is correct; and that this appeal ought to be dismissed, with costs, and they will humbly advise Her Majesty accordingly.

Proctor for the Appellant: Mr. *G. H. Brooks.*
Proctors for the Respondent: Messrs. *Moore & Currey.*

H. I. S. KING . . . . . PLAINTIFF; J. C.*

AND 1874

MARY ELIZABETH TUNSTALL AND OTHERS DEFENDANTS, July 17, 18, 21.

AND THREE OTHER CASES BY THE SAME APPELLANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, IN THE PROVINCE OF QUEBEC (APPEAL SIDE).

Wills—Gift to Adulterine Bastards—Substitution.

The conjoint operation of the Imperial Act (14 Geo. 3, c. 83) and of the Canadian Act (41 Geo. 3, c. 4), is to abrogate the old law which prohibited gifts by will to adulterine bastards.

Under the old law, derived from the Roman Law, and subsequently incorporated into the Canadian Code (see sect. 838), wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined.

THIS was a consolidated appeal from the judgments of the Court of Queen's Bench for the province of *Quebec, Canada,* in four actions of ejectment brought by the Appellant to recover from the Respondents four fiefs or seigniories in the said province of *Quebec,* which were in their possession. For the purposes of this appeal, the facts and pleadings in the four cases were identical and undisputed, and the sole question raised was whether upon the facts next hereinafter stated the Appellant or the Respondents were legally entitled to the seigniories.

The four seigniories in question, called respectively *Delery, Sabrevois, Lacolle* or *Beaujeu,* and *Noyau* were at the end of the last century the property of a general in the English army, named *Gabriel Christie,* who had been for several years stationed in *Canada.*

Gabriel Christie duly made his will in *England* in English form on the 13th of May, 1789, and by it he devised the seigniories according to the following limitations:—

"To the use of my said eldest son *Napier Christie Burton* and

* *Present*:—THE LORD JUSTICE JAMES, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the heirs male of his body lawfully begotten or to be begotten; and for default of such issue, to the use of the heirs male of the body of me, the said *Gabriel Christie*, lawfully begotten or to be begotten; and for default of such issue, to the use of my said natural son *James Christie* and the heirs male of his body lawfully begotten; and for default of such issue, to the use of my said natural son *Gabriel Plenderleath* and the heirs male of his body lawfully begotten, he, the said *Gabriel Plenderleath*, and the heirs male of his body taking upon himself and themselves and constantly using the surname and arms of *Christie*, and not otherwise; and for default of such issue, to the use of my natural son *George Plenderleath* and the heirs male of his body lawfully begotten, he, the said *George Plenderleath*, and the heirs male of his body taking upon himself and themselves and constantly using the surname and arms of *Christie*, and not otherwise; and for default of such issue, to the use of my said natural son, *William Plenderleath* and the heirs male of his body lawfully begotten, taking upon himself and themselves, and constantly using the surname and arms of *Christie*, and not otherwise; and for default of such issue, to the use of my said brother *William Christie* and his heirs for ever."

The testator died without revoking his will, in the year 1799, leaving his wife surviving him, and three legitimate children, viz., one son, *Napier Christie Burton* mentioned in the will, and two daughters, *Katherine* and *Sarah*.

By a notarial deed, dated the 8th of August, 1800, between *Napier Christie Burton*, in his character of residuary legatee, and the widow and daughters of *Gabriel Christie*, the widow agreed to accept certain legacies in the will in lieu of dower, and certain arrangements were made as to the mode of payment of the legacies to the widow and daughters mentioned in the will. And *Napier Christie Burton* then took possession of all the property of *Gabriel Christie*, and *inter alia* of the four seigniories in question, in accordance with the will.

Napier Christie Burton died in the year 1835, leaving no son. *William Christie*, to whom the final remainder in the will was limited, died during the lifetime of *Gabriel Christie* without children, and the three natural children of *Gabriel Christie*, *James*

Christie, and *Gabriel* and *George Plenderleath* had also died without children during the lifetime of the testator's son, *Napier Christie Burton*, before the substitutions in their favour opened, and the only devises over in the will which had not lapsed before the death of *Napier Christie Burton* was that in favour of *William Plenderleath*.

William Plenderleath named in the above will was an adulterine bastard son of *Gabriel Christie*, the testator. The Appellant claimed the seigniories in question (the subject of the above limitations), under the will of *Napier Christie Burton*, who it was admitted was entitled absolutely, if each successive substitution failed by reason of the death of the substitute before the substitution opened; the Respondents claimed under the will of *William Plenderleath*, and the issue of law between them was whether the above limitation in favour of *William Plenderleath* was valid. *William Plenderleath*, on the death of *Napier Christie Burton*, in 1835, assumed the name and arms of *Christie* by royal licence, and took possession of the seigniories, and remained in possession till his death in 1845.

Napier Christie Burton, by his will, which was duly made in *England*, and in English form, and bore date the 20th of December, 1834, devised his real estates in *Canada* and elsewhere to an illegitimate daughter, *Christiana Harmar*, and in the event (which subsequently happened) of her death without issue, and without having sold the said real estates, he devised them absolutely to the Appellant in the following terms:—

"Then I do give, devise, and bequeath, limit, and appoint all and every the said several estates and seigniories, and all my right and interest therein, and all other my real estates in possession, reversion, remainder, or expectancy, unto the said *Henry John Styring King*, his heirs and assigns, absolutely for ever, wishing that he and they do thereupon take and use my surname, *Christie*, and no other, and do use the arms of *Christie*, alone or together with his own, in case the requisite authority for taking the said surname and bearing the said arms can be obtained."

The will contained no devise over in case the Appellant did not take the name and arms of *Christie*.

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William Plenderleath Christie, by his will and codicils, which were made in *Canada*, and dated respectively the 16th of March, 1843, and the 31st of March, 1845, devised the said seigniories to various persons, who accepted the devises so made in their favour, and under those devises the Respondents obtained possession thereof.

The actions in which this appeal was brought were commenced by the Appellant in the Superior Court for the province of *Quebec, Canada*, on the 14th of July, 1864.

The Appellant in each of his declarations claimed the said seigniories under three counts. In each of his three counts he claimed as the devisee of *Napier Christie Burton*.

In the first count *Napier Christie Burton* was in effect alleged to have been entitled as heir-at-law to *Gabriel Christie*.

In the second count the title of *Napier Christie Burton* was deduced as devisee under the will of *Gabriel Christie*, and the Appellant alleged that the substitutions in favour of *Gabriel Christie's* four natural sons, *James Christie, Gabriel Plenderleath, George Plenderleath*, and *William Plenderleath*, were void, they having been, as was alleged, adulterine bastards, and that (the said *William Christie*, the ultimate devisee, having died before the testator), *Napier Christie Burton* became, immediately after the death of *Gabriel Christie*, the absolute proprietor and possessor of all his real estate, and as such entitled to devise the same to the Appellant.

In the third count of the declaration the title of *Napier Christie Burton* was deduced as having been, at the time of the death of *William Christie*, who was the ultimate devisee or substitute under the will of *Gabriel Christie*, the heir-at-law of *William Christie*.

The Respondents filed three demurrers, eight special pleas of great length, and the general issue.

The first demurrer was a formal one to the whole declaration, on the ground that the counts were inconsistent with each other and could not be relied on together; this was subsequently decided in the Appellant's favour, and the Respondents did not appeal.

The second demurrer was to the second count, on the grounds that the Imperial Act, 14 Geo. 3, c. 83, and the *Lower Canada* Act 41 Geo. 3, c. 4, removed the disabilities of adulterine bastards,

and that though the latter Act was subsequent to the death of *Gabriel Christie*, it was prior to the opening of the substitution in favour of *William Plenderleath*, who was by it rendered capable of taking the estate on the death of *Napier Christie Burton*, who was not therefore entitled to more than a life interest in the estate, and could not devise it by will.

The third demurrer was to the third count, and was on the grounds that *Gabriel Christie*, and not *Napier Christie Burton*, was the heir of *William Christie*, and further, that *William Christie* having died during the lifetime of *Gabriel Christie*, the devise in his favour failed.

The first two special pleas alleged in effect that the devise by *Napier Christie Burton* to the Appellant was conditional on his taking the name and arms of *Christie*, and that the Appellant was not entitled to sue till he had done so.

The third, fourth, and fifth pleas set up the notarial deed of the 8th of August, 1800, between *Napier Christie Burton* and the widow of *Gabriel Christie* as estopping the Appellant from alleging *Napier Christie Burton* to have been entitled as heir and not under the will.

The third and fourth pleas also set out the title of the Respondents under the will of *William Plenderleath*, and alleged that the devise in favour of *William Christie* lapsed by his death in the testator's lifetime, and that *William Plenderleath* was entitled to the property absolutely.

The sixth and seventh pleas set up a prescription of twenty and ten years respectively.

The eighth plea alleged that the possession of the Respondents was *bonâ fide*, and that they were not, therefore, liable to repay the mesne profits, and were entitled to set off sums expended in good faith upon the property amounting to £5000.

The ninth plea was the general issue.

To these pleas the Appellant filed joinders in demurrer, and joinders of issue, and he also demurred to the two first two pleas.

It was subsequently ordered by the Court that, before adjudicating upon the issues of law, the parties should proceed to evidence, and that questions of law should be reserved for adjudication till the case was heard on the merits.

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On the 21st of February, 1870, the Court of first instance (*Torrance*, J.) (in a judgment reported in 14 Low. Can. Jur., p. 19), dismissed the Appellant's actions for the following, amongst other reasons, namely—

"Considering that the late *Napier Christie Burton* in the pleadings mentioned, was not heir-at-law of his uncle *William Christie*, in the lifetime of his father *Gabriel Christie*, as erroneously alleged by the third count of the declaration of the Plaintiff.

"Considering that by law and the jurisprudence of the Courts of this province, the testator *Gabriel Christie* had, since the passing by the Parliament of *Great Britain* and *Ireland*, of the Act numbered chapter 83 of the Acts passed in the fourteenth year of the late reign of his late Majesty, *George* III., capacity to dispose of his estate and property without reserve, restriction, or limitation.

"Considering that from and after the passing of the Act of the late Province of *Lower Canada*, numbered chapter IV. of the Acts passed in the forty-first year of the reign of his said Majesty, a testator had a right to bequeath in favour of any person or persons whatsoever all and every his or her lands, goods, or credits, without reserve, restriction, or limitation.

"Considering that by law and the jurisprudence of the said late Province of *Lower Canada*, the late *William Plenderleath Christie* had capacity to take the bequests made to him by the will of the testator *Gabriel Christie*, at the date of the death of the late *Napier Christie Burton*, to wit, in the year 1835, when the substitution in favour of the said *William Plenderleath Christie* took effect."

The Appellant appealed in every case from this judgment to the Court of Queen's Bench for the province of *Quebec, Canada*, The appeals were heard together, and on the 19th of September, 1872, the Court (*Duval*, C.J., *Caron*, *Badgley*, *Monk*, and *Bossé*, JJ.;—*Monk*, J., dissenting) confirmed the judgment of the Court below.

The judgment of *Badgley*, J., to which *Duval*, C.J., and *Caron*, J., assented, contained the following passages:—

"The second count avers that General *Christie's* will being null in relation only to *William Plenderleath Christie* as being an adulterine bastard, *Napier Christie Burton*, as the only son of the

testator, became entitled in fee simple or absolutely to his residuary real estate. In other words, that *Napier Christie Burton* became the owner of the seigniories under his father's will at his death, the substitution to *William Plenderleath Christie* being a nullity.

"As each count of the declaration declares a *distinct* cause of action, the points of contention and the personal interests involved in this second count, which are various and important, will now be examined.

"The Appellant's proposition, as stated in his factum to this Court, is as follows: 'A bequest to an adulterine bastard, other than as mere alimentary allowance, is a nullity, and therefore *William Plenderleath Christie* was not merely incapacitated by law from receiving General *Christie's* bequest, but the bequest itself, from the moment of its inception, was a nullity, and produced no more effect in law than if it had not been made.' In other words, the bequest was an absolute nullity, both in the devisor and in the devisee.

"A few words may be premised upon this matter of nullities generally; it is trite to say, and it is so well recognised as a rule or maxim of our law as not to need an appeal to authorities to support it, that nullities must be so declared by law. '*C'est un principe constant que les nullités n'ont pas lieu* de droit, *et l'on n'a jamais connu en France d'autres nullités que celles qui sont textuellement prononcées par les ordonnances: c'est ce que Mornac a enseigné avec précision sur la loi* 1*er ff., de procurat. et defens.*, s'il n'est dit sur peine et nullité ut vulgo loquimur' and again, '*Il est vrai que les nullités ne se suppléent pas, elles doivent être textuellement prononcées par la loi.*' So also *Solon, des Nullités*, pp. 133, 134. Not only must the existence of the nullity have been enacted, but it must have been so adjudged in the particular to give it operative effect, '*car les nullités ordonnées par les lois, doivent être prononcées par les magistrats*' and this upon objections made by those who have legal right and interest to make them. Solon, in his *Tr. des Nullités*, says, '*Les nullités doivent être prononcées par jugement. Les actes sont présumés valides jusqu'à ce que la nullité ait été déclarée par jugement, et cela sans aucune exception.*' He adds, 'that it is a legal remedy given to him whom the contravention has injured.

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It would be abuse of the law to accord the remedy to one who has not suffered from the act.' Now, it is asserted without hesitation that no such nullity has been enacted in the edicts and ordonnances of the French kings, nor is it to be found in the articles of the custom for this particular. It has no place in the Civil Code of this province.

"Referring to the objection stated in the proposition of the Appellant, it applies first to the devising capacity of General *Christie* at the so-called inception of his bequest, presumably, at the time of the making of his will, and also at the time of his death, when it is averred that the will took effect, *Napier Christie Burton* then becoming the alleged owner of the seigniories under the will. The impugned bequest at both times will be treated as one event as to the devising capacity of the testator, and in explanation, a brief reference must be made to the old French law under the *Coutume de Paris* from which our common law is principally derived.

"By the customary law of old *France* generally, and particularly by that of the custom of *Paris*, testamentary dispositions were not favoured, owing to the intricacies caused by the numerous legal divisions of property and inheritances, which *Malleville*, a modern commentator upon the *French Code*, calls a '*pépinière de procès*,' and also by the limitation upon the devising power, from the policy of preserving estates in families, allowing the free devise of moveables and acquired immoveables, *acquêts et conquêts immeubles*, property by purchase, but only of one-fifth of the *propres*, immoveable property by descent, although all the property, moveable and immoveable, *propres et acquêts*, might be freely given by donation. By the 292nd Article of the Custom, four-fifths of that class of immoveables, *les propres*, property by descent, were strictly reserved as *légitime* for the *héritier du sang*, the natural heir, which the testator, by the text of the Custom, was expressly prohibited from disposing of by last will, and this brought with it, into general practice, the rule of the immediate seisin of the heir by the ancestor at his death, *le mort saisit le vif son hoir plus proche et habile à lui succéder*, the effect of which was to continue in the person of the natural heir the possession and seisin of the ancestor *of all his estate*, compelling devisees and legatees to demand by

action at law or otherwise from the heir, a delivery to them of their legacies and bequests, before they could take possession of them or exercise any right over them. This right, which was attended with great inconvenience and annoyance to devisees and legatees, was required in the sole interest of the heir to prevent a possible violation of the prohibition in his favour, and to shew that his legal rights, his proportion of heritable property, had not been exceeded by the testator.

"By the 292nd Article of the Custom, it was declared that 'all persons of sound mind and of age to exercise their civil rights, might devise their moveables, acquired immoveables, and one-fifth of their *propres*, and no more,' all which, however, with the reserved four-fifths of the *propres*, as *légitime*, for the natural heir, were in his possession and seizin by the mere death of the ancestor, and could become beneficial to the devisees and legatees only by the *délivrance de legs* made by the heir.

"By Royal Edict of April, 1663, the law of the *Custom of Paris*, as it then was in *France*, was established in French *Canada* as the municipal law of the colony, to be administered under the supervision of the *Conseil Supérieur de Québec*, also constituted under the said Edict, and subject to be altered only by Royal legislation for the colony when received and registered by the *Conseil Supérieur* in the province, which became, by the force of the Edict, to all intents of like independence as to its law and jurisprudence as any of the provinces *de Droit Écrit*, or *de Coutume*, into which *France* was then divided, and in fact as independent in that respect as the parent *Coutume et Prévôté de Paris*. The law as to last wills and testamentary capacity and the seisin of the heir continued to be the law of the colony until its cession to *Great Britain* by the Treaty of 1763.

"The Imperial Act of 1774, 14 Geo. 3, c. 83, known as the *Quebec* Act, established a civil government for the conquered province, up to which time the old French law was on sufferance only, and at the same time restored the old laws of *Canada*, to be thenceforward the civil laws of *Canada*, and amongst others the customary law regulating last wills and the extent of the testamentary capacity, but specially attaching to these the particular proviso of the 10th section of the Act, overriding the 292nd Article, and expressed as

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follows: "That every person, owner of lands, goods, credits, &c., in the province, having a right to alienate the said lands, &c., &c., in his lifetime by deed of sale, gift, or otherwise might devise or bequeath the said lands, &c., &c., at his death, by his last will and testament, any law, usage, or custom heretofore or now prevailing in the province to the contrary in any wise notwithstanding, such will being executed according to the laws of *Canada*, or according to the forms prescribed by the laws of *England*.

"This statutory proviso upon the reintroduced law of the Custom in the particular stated was in fact the substitute for the 292nd Article of the Custom in that respect, to be read for it, and became our municipal law in place of the old article. It gave the power of devising without reserve or limitation, and this entire freedom and enlarged capacity of devisors to devise the whole of their property necessarily did away with the policy of the old jurisprudence, and by force of the existing law, and by the force of the last will, the restricted capacity of devisors was removed, and the claim and seisin of the heir over the devised property were abolished, as he no longer could have interest in the estate unless as legatee and devisee under the will; the devisees and legatees concerned in the estate having immediate seisin without the intervention of the natural heir.

"It was held in the cause of *Durocher* v. *Beaubien*, appealed from the Provincial Courts here to the Privy Council, and there decided on the 13th of May, 1828, that the statute 14 Geo. 3 extended the subject over which the devisor had rights, and applying that decision in this case it may be added to it, that the subject was so extended without any reserve, the words of the statute being without limitation. In 1789, the time of the so-called inception of the bequest, when General *Christie* made his will, he exercised his free right under the terms of the existing law to devise his whole estate, which he did by his will executed in the English language in *England*, and according to the forms prescribed by the laws of *England*. In 1799, the time of his decease, he devised his whole estate by his said will, at his death, under the authority of the same existing law, which recognised and carried with it no restriction or limitation upon his devising capacity; wherefore the objection of the absolute nullity of General

Christie's bequest in question, at either of these times is unfounded. Since the statute there has never been any doubt as to the unreserved devising capacity of testators.

"In the next place, a similar objection of incapacity, from averred absolute nullity, is alleged against *William Plenderleath Christie* as absolutely excluding him from General *Christie's* bequest in his favour at all times.

"It has been seen that General *Christie* had perfect capacity to make his bequest, and that it was not a nullity as to him, it only remains to ascertain if the alleged incapacitating nullity was absolute against *William Plenderleath Christie* for all time, and if not, at what time the incapacity ceased to have operative effect.

"As for the devisor so for the devisee in the particular in question, no such absolute nullity has been enacted by the French kings, the only legislative power then known in *France* competent to make nullities; nor does it exist specially in the Custom against the capacity of illegitimate children to receive gifts or devises from their natural parents, although that capacity has been a subject of unsettled jurisprudence for many years with alternate results in *arrêts* or judgments.

"The rigour of the later Roman law became in time tempered by the canon or ecclesiastical law which influenced the French Courts, and which, as *Swinburne* says, p. 370, is more agreeable to nature, equity, and humanity, even in the case of incestuous children, and which was generally expressed in the old customary law maxim, reported by *Loysell* in his *Instituts Coutumiers, Lib.* 1, *Reg.* 41. '*Qui fait l'enfant le doit nourrir, fût-ce* ex nefario coitu.' Under this humanizing influence, what *Swinburne* calls *needful and convenient sustentation*, and known in *France* under the general name *aliments* might be given by parents to their illegitimate children, without distinction, whereby their capacity to receive from their parents became the rule of the law, and was no longer a doubtful question, and ceased at last to be a judicial question of aliments altogether. Since the Reformation of the *Custom of Paris* in 1580, the jurisprudence of the Custom has been persistent in acknowledging in principle the capacity of illegitimate children to receive from their parents, and has varied only as to the extent of the gifts or devises. From the absence of general royal legislation

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uniformly to guide and control the Courts in the various and conflicting civil law and customary provinces of *France*, in litigations before them, they assumed a moral and social censorship and exercised extraordinary so-called equitable powers without law, but simply as a kind of self-adopted practice or procedure, *à l'arbitrage des juges*, by which they settled contracts, interpreted wills, and in the interest of marriage modified bequests and gifts of parents to their illegitimate children. This judicial power was entirely arbitrary and without legislative sanction, and the Court *arrêts* were not so much those of Judges of the law as of judicial members of society, yet in all their divergencies the capacity of illegitimate children to receive from their parents was not denied.

"*Ricard*, in his *Tr. des Donations*, pp. 104, 105, and his *Annotator*, pp. 106, 107, exhibit those differences of judicial opinion. *Ricard's* practice in the Courts enabled him to refer to a series of *arrêts* or judgments by the Courts and *Parlement de Paris* which establish, he says, that '*pendant un temps considérable, il s'y était établi une jurisprudence suivant laquelle on ne doutait plus que les enfants naturels ne fussent capables de recevoir* toutes sortes de donations et de legs universels *de leurs pères et mères comme des étrangers en auraient pu faire.*' He cites *l'Avocat Général le Bret, Tr. de la Souveraineté du Roi, lib.* 2, *ch.* 11, and adds, that '*les donations et les legs des pères et mères à leurs "enfants bâtards n'avaient point d'autres limites que ceux des autres."*' *Ricard* refers to an *arrêt* of the 17th of March, 1584, which confirmed *un legs universel* by a parent to his bastard child, and gives others to the same effect in his own time in 1648, 1652, and 1655, upon the conclusions, the two former of *Avocat Général Talon*, and the latter upon those of *Avocat Général Bignon*, both celebrated and eminent French lawyers. To which may be added another to the same effect on the 17th of July, 1665, mentioned by *Pothier*, *Tr. des Substitutions*, No. 152, who refers to it as reported by *Soefve*, 1 *vol., centurie* 4, *ch.* 99, and which he says '*a confirmé une disposition universelle par un père au profit d'un bâtard légitimé par lettres.*' But it is admitted that these *lettres* have no other effect *que pour les honneurs* and do not change the natural quality of the person as a bastard. *Furgole* in his 1st vol. *des Testaments* refers to these same *arrêts* and adds others omitted by *Ricard*. *Furgole* says at p. 424, '*Le premier arrêt, qui a déclaré les*

bâtards capables de dispositions universelles de la part de leur père et mère, a été donné dans la Coutume d'Auxerre le 27 *mars* 1584, *et fut prononcé en Robes rouges* (the Supreme Court). *Le second est du* 5 *février* 1614. *Le troisième du* 25 *mai* 1618. *Le quatrième donné à l'Audience de la Grande Chambre (en appel) le* 9 *mars* 1648, *au rôle de Paris rapporté au* 1*er tome du Journal des Audiences. Le cinquième du* 8 *mars* 1652, *rendu sur les conclusions de M. l'Avocat Général Talon qui dit que les bâtards étaient capables de toutes sortes de legs, et de donations, sans que pour cet effet, il fût besoin de lettres de légitimation. Le sixième fut prononcé à huis clos le* 17 *juillet* 1655, *conformément aux conclusions de M. l'Avocat Général Bignon.*' After these follows the *arrêt* of the 17th of July, 1665, to the same effect mentioned by *Pothier* out of *Soefve*. *Ricard* and *Furgole* both add, that *postérieurement, les arrêts ont changé cette jurisprudence*, and ignored general dispositions, the change being first applied to donations *entre vifs, inter vivos*. It was manifestly a fixed jurisprudence up to 1663 and afterwards, but even after the change began in *France*, the jurisprudence both for donations and last wills sustaining the principle of the capacity of natural children to receive gifts from their parents, not alone mere aliment, assumed the right to reduce their amount. *Ricard* cites *arrêts* in which such reductions were made, but always *à l'arbitrage des juges*. The *Coutume et Prévôté de Paris* did not regulate all the other Customs of *France;* they were independent of each other in that respect, and amongst others, *Auvergne, Tours, Bourgogne*, and *Melun* had favourable provisions for bastards, and admitted their receiving capacity from their parents. In fact no general law for such matters existed in *France*, and each *Coutume* supported its own local customs and its local jurisprudence. In adverting to such subjects as occurring in the Customs of *Orléans* and *Paris*, *Pothier* and other writers of about the beginning of the eighteenth century, commenting on these matters, treated them as subject to the local jurisprudence of the Custom at the time they wrote. Up to, and indeed after April, 1663, when the *Coutume de Paris* was established, and the *Conseil Supérieur de Québec* was constituted in French *Canada*, the previous Parisian jurisprudence of free and universal dispositions by last will prevailing in *Paris* came with

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the *Coutume* into *Canada*, and the subsequent jurisprudence, as to the reduction or the opinions of the commentators upon that existing jurisprudence, could of right have no controlling or paramount effect here. Since 1663 that previous jurisprudence has not been disturbed by any contradictory jurisprudence to be found in the French Colonial Archives, nor is it probable that such cases would occur in the colony up to the time of its conquest or of its after cession to *Great Britain* in 1763; certainly, if such general dispositions to bastards were made in the colony, they were not interfered with by colonial jurisprudence, and no such cases have been reported in the records of the French Colonial Courts. No such jurisprudence against general dispositions to bastards has been made since 1774. Whatever might have been the local jurisprudence of the *Prévôté de Paris*, the Colonial Courts were under *no obligation to change* with the changing jurisprudence in *Paris*, nor unless required by royal edict therefor, duly received and registered in the *Conseil Supérieur* at *Quebec*, when it would have become a general colonial law, but none such appears.

"The arbitrary nature of the French *arrêts* is shewn in those referred to by *Ricard* and his annotator. As early as May, 1663, the Courts at *Paris* rendered an *arrêt* by which they confirmed a devise to a bastard child by his father of 600,000 livres without reduction, upon the sole ground that the latter had left a large fortune, and there are several others, in more modern times, of the reduction of such legacies from 18,000 livres to 8000, 60,000 to 11,000, 20,000 to 10,000, and others, in all which the annotator shews conclusively that the measure was not upon the principle of mere aliment, but according to the means of the parent, for distribution amongst his children generally; he says, '*On les mesure moins par leurs besoins absolus* (as aliments) *que par les facultés de leur père naturel;*' or as *Furgole* says: '*En égard aux biens que le testateur a laissé,*' as by *arrêt* of 1709; or as *Swinburne* says: 'According to the wealth and ability of the parents.' The annotator adds finally: '*Du rapprochement de ces arrêts, il résulte la confirmation du principe, que les legs faits aux bâtards par leurs pères et mères sont sujets à la réduction s'ils sont excessifs, mais que la mesure de la réduction est absolument à l'arbitrage des juges.*'

Ferrière, an authority of the eighteenth century, as above, in his commentary upon the 292nd Article of the Custom, says 'that illegitimate children, by the jurisprudence of the time, might freely receive *des dispositions particulières*, but not dispositions *universelles*;' and *Pothier*, in his *Tr. des Donations*, p. 359, is to the same purpose, saying, '*Ils sont capables de donations des choses particulières quoique considérables.*' The *devise à l'arbitrage des juges* had by that time lost all its original supposed element of *aliments*, and had become a mere gift or legacy proportioned to the fund lying for distribution amongst the children generally, and it was held that where there were no legitimate children or lineal descendants of the deceased, the universal disposition would hold good for the natural child to the exclusion of the parents of the deceased father. The modern French law under the Code has adopted this last rule, and besides has enlarged the capacity of natural children, giving them fixed proportional parts of the general estate with the legitimate children in successions and by last will, favouring equally the adulterous and natural children, but excluding the incestuous, except from aliments.

"The later jurisprudence of *France* was never acted upon or prevalent in this French colony, nor could by any possibility exist here since 1774, and therefore could never establish the testamentary nullity or incapacity averred in the proposition against the receiving capacity of *William Plenderleath Christie*, after the 14 Geo. 3, c. 83. It cannot, therefore, be denied that such illegitimate children, not incestuous, had receiving *capacity for gifts and devises from their parents*, not merely as alimentary allowances, and had, therefore, the passive capacity of the books, *pour pouvoir demander, recevoir et conserver les libéralités*, as *Furgole, des Testam.*, says, and are incapable only when so '*déclarés par la loi, les ordonnances, statut, ou coutume*,' p. 317, indicating the non-existence of the alleged absolute nullity, which the annotator of *Ricard* qualifies as follows: '*Au reste l'incapacité des bâtards pour recevoir des dispositions universelles ou trop étendues n'est qu'une incapacité relative*,' only as to their parents; and *Furgole*, distinguishing the incapacities to receive, classifies them as *absolute;* as by aliens, persons civilly dead, &c., being personal to these: *respective*, as by tutors,

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curators, physicians, &c., under the *Ordonnance* of 1539, from their pupils, patients, &c., being under their influence: and *relative*, as by illegitimate children for *certaines libéralités* from their parents, p. 359. So *Pothier, Donat. Testam*, 152, says they were '*capables de recevoir des legs particuliers quoique considérables et en propriété.*'

"Upon the whole it is plain that there was no such nullity whatever under the old French jurisprudence, that by that law there was only a restrictable capacity to receive, and that not *de droit*, but only on legal demand, therefore, of those concerned in the estate and entitled to demand the reduction. *Solon, Tr. des Nullités*, says that by the *Code Nap. Nullities* are those enacted by legislation and so adjudicated, and nullities by action at law, but that these distinctions did not exist in the jurisprudence of the Customary and Civil Law Provinces of old *France*, unless there established textually in the Royal Ordinances or the Articles of the Custom, or they were *de pure faculté;* that there were no nullities *de non esse*, but they must be demanded: he then says relative nullity was merely '*une faculté que le législateur avait voulu accorder à une personne* to interfere with *actes et procédures inattaqueables par toutes autres personnes:*' that a relative nullity can never become absolute, '*parce qu'elle n'a de force que par la déclaration de ceux en faveur desquels elle est établie.*' Without a charge of such nullity and incapacity, and its resulted adjudication as such, the deed or will stands good and valid, whatever the disposition, whether particular or general, when it becomes operative for the devisee, and repeating *Solon*, already cited, 'Nullities must be pronounced by judgment, *actes* are presumed to be valid, *jusqu'à ce que la nullité ait été déclarée par jugement et ce sans aucune exception.* It is a legal remedy given to one whom the contravention has injured, it would be an abuse of the law to accord the remedy to him who has not suffered by the *acte*, or shewn that he has suffered.' In these cases the Appellant has not asked for a judgment of nullity, which cannot be given, therefore, *ex mero motu* by the Court. *Perrin, Tr. des Nullités*, says, at p. 462, 'Nullities are covered by prescription; whoever might claim the annulment of an *acte* or deed which appears against him, and keeps silence, seems to acknowledge the justice and validity of the title, or at

least he shews that he has no intention to demand the nullity. The silence becomes a legal presumption, when such a delay occurs, that public order in some degree is interested in putting an end to such actions, *il doit y avoir un temps après lequel la partie est censée renoncer à l'action en nullité.*' The prescribing period is thirty years, and counting from the testator's death in 1789, to the death of *Napier Christie Burton* in 1835, forty-six years have elapsed, and up to the institution of these actions in 1864, seventy-five years have elapsed. The Respondents have pleaded the absolute prescription of thirty years against the actions, which is a legal *fin de non recevoir* against them.

"It is evident that the law of *France* did not limit the devising capacity of the devisor except for the *légitime*, the four-fifths, of the *propres*, immoveables by descent, and even that limitation was abolished here by the Act of 1774. Now, in *France*, the limitation affected only the *propres*, but did not affect *acquêts et conquêts immeubles*, immoveables by purchase, which were at the full disposal of the devisor, as were therefore necessarily these seigniories, which were all *acquêts*, acquired by purchase, by the testator. His devising capacity, therefore, under any circumstances, was not limited, either when he made his will or when he died. The receiving capacity of the devisee, in *France*, might also be limited by the reduction of the Courts, when legally demanded and adjudicated upon at the instance of an interested party against it, but otherwise the will or *acte* is presumed to be valid, and stands good, but no such demand has been made nor adjudication been asked for in these cases. Under the existing law of *Canada*, therefore, at the death of General *Christie*, the capacity of the devisee to receive was not more limited than that of the devisor to give.

"It will be noticed that General *Christie* devises to *William Plenderleath Christie* and his other illegitimate sons, by name, as his *natural* sons, designated as such in the terms used denoting the persons so named; these terms have different significations by the law of *England* and the law of *France*, and, therefore, need explanation. As to this, *Story* lays down the rule, p. 402, as follows: 'Whenever words of ambiguous signification, or different significations in different countries, are used in a will, they are to be

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understood in the sense in which they are used in the law of the testator's domicile, with which he may be presumed to be either most familiar or to have adopted.' *Burge*, vol. iv., No. 590, is to the same effect as to such words. It is quite clear that in such cases the inquiry is not as to whether there was a devise or substitution, or of what estate or interest, which are of course subject to the law of the situation of the devised real property, but as to the persons denoted by the terms *natural sons*, applied to them by the will. Now, the will purports to be that of General *Christie*, as follows: 'I, *Gabriel Christie*, residing in *Leicester Square*, in the parish of *St. Martin-in-the-Fields*, in the county of *Middlesex*, in *England*, Colonel Commandant in the second battalion of His Majesty's Sixtieth or Royal American Regiment of Infantry, now in the province of *Quebec*, in *North America*, and Major-General in His Majesty's army, do make this my last will and testament in manner following,' &c. The will was made and executed in *England*, in the English language, with the technical terms used there for such purposes by that law, and specially for his intended disposition of his real property, and it was there attested as required by that law for the devise of such property. By the will the testator devised his real property in *North America*, &c., by the dispositions therein mentioned, and, after others, over to his *natural sons* named in the will, in tail male successively, including the last named *natural son, William Plenderleath*. Now, by the law of *England*, the common terms 'natural children' designate all children born out of marriage, comprehending all without distinction; by the French law of *Canada*, '*enfants naturels*,' the translation of the English terms, denote distinct and different classes as *bâtards simples, adultérins et incestueux*, with different capacities of each, whereas by the English law the general term 'bastard' includes under one term all those distinctions of the Civil Law retained in *France*, and being the synonym of the term natural son, admits not of the distinctions of the French law. *Swinburne*, part 5, sect. 7, a rigid civilian of his time, after explaining the Civil Law distinctions above, at p. 370 says: 'The fourth limitation to the Civil Law rule is grounded on the laws of the realm, which do permit every man both by deed made and executed

during their lives, and also by their last wills and testaments to be executed after their deaths, to give and to devise to any of their bastards, *without distinction*, all their lands, tenements, and hereditaments *without restraint*.' So it is natural to infer that the terms *natural son* must be understood in the sense of the law of *England*, where the will was made, and where the testator declared his then domicile to be, the terms used being general and without distinction. This count has charged the terms *adulterine bastard* against the said natural son, *William Plenderleath Christie*, affirmatively, although not to be found in the will, and the Appellant not only has omitted to prove them, but actually contradicted them by his own admission, shewn in the 13th Articulation, and his answer thereto: 'It is true that *Napier Christie Burton* died in 1835, leaving no heir male, and that upon his death *William Plenderleath Christie*, a natural son of *Gabriel Christie* (General *Christie*) then took possession of the estate,' and even if the fact had been admitted by the devisee against himself, his admission could not be legally received as evidence of the fact, nor could that evidence be legally made by the Appellant. *Troplong*, vol. ii., *Donats-Test.*, p. 35, declares: '*Si la qualité d'enfant adultérin est le résultat d'un acte de reconnaissance volontaire*, it is not allowed against him. *La reconnaissance d'un enfant adultérin n'est pas admise: l'article la repousse afin d'étouffer le scandale de l'inceste ou de l'adultère. Il n'en doit donc rien rester, elle est proscrite d'une manière absolue.*' So also *Solon*, p. 77. Now this merely reproduces the old French jurisprudence, as shewn by *Furgole* and others, and by both laws the proof of such social or family scandals was prevented.

"It has been shewn by *Swinburne* that in English law there was no distinction in the general quality of natural children, and that general dispositions might be made to them without restraint; now, recurring to the imperial Statute of 1774 (14 Geo. 3, c. 83), the *Quebec* Act, which established, as stated, civil government and laws in the province of *Quebec*, and by the 10th section specially enacted a proviso against a particular law of the custom amongst those re-established generally by the statute; assuming the proviso to be the substitute for the 292nd Article of the Custom to be read in its place, the proviso would seem to have been intended by its makers in *England* to have a more general extending operation

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than merely to extend the subject for devising, as stated in the case of *Durocher* v. *Beaubien*, and this conclusion will be shewn by bringing the two laws into juxtaposition:

'Art. 292.—All persons of sound mind, of age to exercise their civil rights,	'Sect. 10.—Every person owner of lands, goods, &c., in the province having right to alienate the said lands, &c., by deed of sale, gift, or otherwise,
May devise their moveables, acquired immoveables and one-fifth of their *propres*, and no more.'	May devise or bequeath the same at his death by his last will and testament.'
'*Au profit de personnes capables.*'	'Any law, usage, or custom heretofore or now prevailing in the said province, to the contrary hereof in anywise notwithstanding, such will being executed according to the laws of *Canada*, or according to the forms prescribed by the laws of *England*.'

"Reading the proviso as the substitute for the article, and considering its English origin, where entire freedom was observed in favour of devisees without distinction, the proviso could only have contemplated for this province the same enlarged power as was practised in *England* in such matters, and demonstrated the intent by omitting the qualifying words of the article as to the devisee, leaving the devisor free to give to whomsoever he might think proper to receive his liberality, and necessarily giving to these capacity freely to receive without restraint. This proviso was the only change effected upon the old re-introduced law, and seemed to be intended to make testacy in *Canada* as extended and beneficial as in *England;* for such purpose the enlarged power of the devisor must be complete and free in its execution, by enabling him at his decease to give his property effectively to any person whomsoever by his will; otherwise the power would be something more than inconsistent with common sense and justice,

in extending unreserved freedom of devising over the whole property, but at the same time nullifying that freedom by preventing the devisee from receiving it. '*Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.*' So '*Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potest.*' This construction places the subject on the footing of jurisprudence of the *Paris Coutume* at the time of its introduction into French *Canada*, in April, 1663, and which, as already observed, has not been disturbed by any contradictory colonial judgment. The opinion expressed herein by Chief Justice *Duval* upon the construction of the statutory provision appears to be conclusive for the capacitating effect of the law, and for the removal from the devisee of all incapacities to receive the disposition in his own favour. In effect conforming with the French jurisprudence above adverted to.

"It has been objected against the enlarging effect of the enactment to remove the previous incapacity of devisors to make such a bequest, that the previous law, the French law, was a law of public order and morality, and could not be set aside except by express terms specifically innovating upon the terms of the old law. It is sufficient to say that it was not a law so known, it was merely a French jurisprudence at any time, and, as shewn above, such bequests by parents were protected by the Parisian jurisprudence, up to and after April, 1663, when the law of the Custom was established here, at which time such bequest was not held to be against public order or morality as then known and practised in the *Prévôté de Paris.* It will likewise be borne in mind that the statutory provision originated in *England*, where such freedom of devise prevailed, and where neither law nor public order or morality incapacitated bastards, without distinction, from receiving bequests without restriction from their parents; and the same capacity exists in the common law in the *United States:* see *Kent*, Com. vol. ii., p. 209, *et seq.; Redfield* on Wills, vol. i.; and by the decision of the Privy Council in *Durocher's Case*, it was held that the alleged incapacity of testators was removed by the Act of 1774. This Act was in force in the province of *Quebec* in 1789, the date of the will and bequest in favour of the testator's natural son, *William Plenderleath*, and has not been repealed."

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In a later part of the judgment, having pointed out that the law requires of the *substitué* the capacity to receive when the substitution opens for him, because, as *Furgole* (vol. ii. p. 257) says, the principal effect of the happening of the condition is to purify the testamentary disposition, and to enable the *substitué* to take action upon the disposition subject to the condition, and to attribute to himself an irrevocable beneficial right in the substituted property, Mr. Justice *Badgley* proceeded as follows:—

"The only real question that remains is, therefore, the capacity of the substitute, *William Plenderleath Christie*, to take the substitution when it opened for him in 1835, by the death of *Napier Christie Burton* without having had lawful male heirs of his body. The books abound with authorities upon this point, some few of which will be referred to, but it must previously be borne in mind that the capacity of *William Plenderleath Christie* to take upon that event, was demonstrated by the previous observations upon the existing laws under the Acts of 1774 and 1801, as adopted by the Privy Council in *Durocher* v. *Beaubien*, and expressed by the Master of the Rolls, that the disposition over, by the Act of 1801, 'to any person whatever, was unlimited, and taking the words according to their common sense, that Act would sanction a devise to any person, although previous to the passing of the Act, such person was prohibited by the law of *France* from receiving such devise.' The observations of the codifiers of our Civil Code are important as to this question of capacity, and fix the rule of law manifestly in favour of the devisee, *William Plenderleath Christie*. Their observations were in the nature of judicial reasons for the law which they recorded in the Code, because their chief mission was to declare what was the existing law at the time of their labour. They observe, at p. 171 of their Report upon Wills, 'As a general rule, the capacity to receive by will is considered relatively to the time of the testator's death, that being the period at which the will most usually takes effect. If, however, it take effect only at a subsequent date, the capacity has to be considered with respect to such later date. Such is the tenor of the article which, as regards the person benefited, also lays down the rule, that he need only be in existence at the time at which he is called to

receive, and be then identified as the person designated by the testator, although at the time of the will or at the death of the testator, he was neither named nor born.' The codifiers then referring to existing differences between gifts *inter vivos* and last wills, as to certain incapacities of the former for *concubinaires, adulterous and incestuous* children, which the codifiers say they have maintained in some respects for such donations, though at the time they have restrained them within more equitable limits, they then add, '*as the actual law with regard to wills makes no distinction, it must be admitted that those incapacities do not exist in wills in the matter of devises and legacies.*' The article referred to by the codifiers above is the 838th of the Code, as follows: 'The capacity to receive by will is considered relatively to the time of the death of the testator, in legacies the effect of which remains suspended after the death of the testator, whether in consequence of a condition or in case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect.' This is enacted as being the old existing law certainly from the Act of 1774 declared by the Act of 1801 *sur le sujet.* Now both these laws, the proviso of 1774 and the Act of 1801, although general in their terms, apply to a purpose of merely municipal law, involving no public or political rights, and independent of constitutional restraint, as they have been united together in the explaining Act of 1801, which clearly and sufficiently expresses the retrospective intention; they should also, therefore, be taken together in construction as they have been in the section of the Consolidated Statutes, and in the Article of the Code; without this, there is difficulty in realising the possibility of a testator having unlimited right to dispose without such right including the unlimited power to receive even under the law of 1774, but under the existing law, the limitation of the right to receive would much look like a limitation of the right to dispose, and would annul the effect of the law of 1774, which could not be; hence, according to our existing law from those statutes, capacity is the rule and incapacity the exception both to give and to receive. Both statutes being general in their terms for devisors and devisees, they can be controlled by no limitations or exceptions, unless specially declared. This rule is

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expressed by *Ricard* in his *Tr. des Donations*, No. 126, where, adverting to the capacity of giving by last will, he lays down the maxim, which translated literally is as follows: 'We should labour upon the principle that, the law or the custom of the country permitting dispositions of property by last will, all persons subject to the law may use that power, either to give or to receive, unless particularly excluded by some prohibitive law, &c., which is founded upon this reason, that the permission being general, it can only be restrained by laws that contain limitations, because the law which is expressed in general terms includes all cases and all persons if they are not specifically excepted.' Now the laws above adverted to fall completely within the above rule; both are expressed in general terms, and both are without limitation or exception, establishing general capacity to give and to receive, and removing all disqualifications upon either power; and hence the disqualification imputed to *William Plenderleath Christie* was plainly removed by the effect of the laws referred to. This subject has already received the consideration of the Provincial Courts, in the case of *Hamilton* and others, executors *par reprise* of *Napier Christie Burton*, in a suit instituted by him in 1834, under General *Christie's* will *en nullité de legs*, against the said *William Plenderleath* as being under the adulterine incapacity above referred to. In that case the Defendant pleaded the capacitating effect of the existing law under the statutes above mentioned, and the Court, composed of three Judges, by their unanimous judgment in October 1839, sustained the plea and dismissed the action. The original Plaintiff having died in 1835, his executors, *Hamilton* and others, continued the cause and carried it to judgment, which being adverse to them, they brought it before the Court of Provincial Appeal, where they urged the Defendant's disqualification, under the old law of *France*, at the execution of the will and at the death of the testator, as an absolute nullity of the bequest to the Defendant, the proviso of 1774 extending only the power of devisors, and the Act of 1801 not applying to the testator who had died before that law was enacted. The judgment of the Court in 1845, composed of four Judges, among others the presiding Judge, the late Chief Justice *Bowen*, giving particulars, stated that 'with respect to the effect of

the Provincial statute 41 Geo. 3, c. 4, decisions of some of the Courts were not wanting, which went the length of considering it to be declaratory of the 14 Geo. 3, and as having a retrospective effect, thereby removing all the disabilities of the French law, as well with relation to devisors to make wills as to devisees to accept bequests and legacies. But, that it would be sufficient to shew that the Act of 41 Geo. 3 had removed the previously existing incapacities in devisees,' which he established by reference to the judgment of the Privy Council in the case of *Durocher* v. *Beaubien*. As to the capacity of the devisee being sufficient at the time of the opening of the substitution, he said, 'no doubt existed in the minds of the members of the Court that the claim of the Plaintiff to set aside the legacy was unfounded, and that if the legal representatives of *Napier Christie Burton* had resumed the *instance* instead of his executors, the judgment of the Court below would have been affirmed.' Both Courts agreed upon the merits of the action, 'holding that a devise made to a *bâtard adultérin* not competent by the French law when the will was made or when the testator died to accept such bequest, was good and valid if it were a conditional one as a substitution, and if at the opening of the substitution, or when the entail took effect, the disqualification of the devisee had been removed.' The cause was sent back only on account of the wrong parties before the Court. Although not according to present practice, there was nothing to prevent the Court of Appeals from expressing its opinion upon the merits of the cause, following French precedents in such cases, as tending to put an end to litigation, and which had the effect in that case, as the Plaintiffs proceeded no further in the cause, and it was finally dropped from that time. The cause in appeal is reported in *Revue de Législation*, vol. ii. p. 1 *et seq.*, a provincial law publication.

"It seems evident, therefore, that the alleged incapacity of *William Plenderleath Christie*, if it existed, had been removed by the effect of the general capacitating law existing in the province long anterior to 1835, the time of the opening of the substitution for his benefit, and enabled him to receive the bequest as any person whatsoever, and this is established by an undisturbed legislative and judicial concurrence, which may be resumed as

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follows:—First: Legislatively, by the statutory enactments of 1774 and 1801, condensed and combined in the 2nd section of chapter 34 of the *Consolidated Statutes of Lower Canada* of 1861, afterwards continued and adopted *in ipsissimis verbis* into the *Civil Code*, enacted and promulgated in 1866, and still in force, the whole without limitation or restriction upon the devisor to give or the devisee to receive. Secondly: Judicially, by the judgment of the Provincial Court of Appeal, in *Durocher* v. *Beaubien* in 1826, composed of five Judges, and confirmed by the judgment of the Privy Council in 1828, which has not since been disturbed; again, by the judgment in *Hamilton* v. *Christie* in the King's Bench in 1839, composed of three Judges, and supported on the merits by the unanimous opinion of the Provincial Court of Appeals, in 1845, composed of four Judges; then by the opinion of the three judicial Codifiers, as expressed in their Report upon Wills in January, 1864, referred to above; then again in this cause, by the considered judgment of the Court below, composed of one Judge, from whose judgment this appeal to this Court has been taken; and, finally, by this Court, composed of five Judges, four of whom are in concurrence, and the fifth, Mr. Justice *Monk*, dissented mainly upon the non-retroactivity of the Act of 1801, which, he admitted, removed disqualifications in devisees from that time. It would be difficult to present a more uniform and consistent legislative and judicial concurrence of interpretation in favour of the pretensions of the devisee litigated in this cause, and of his capacity to receive the bequest in his favour when his receiving power became legally effective.

"It only remains to ascertain from authority if his capacity legally existed when he entered into possession of the seigniories at the death of *Napier Christie Burton* in 1835. A few accredited authorities will establish that right. 1 *Furgole des Testaments*, p. 304: '*Si le fidéicommis est conditionnel, soit que la condition se trouve expresse ou littérale ou qu'elle soit seulement tacite et implicite, comme quand la restitution doit en être faite à jour incertain, ou en faveur d'enfants à naître dont la naissance est une condition impérative, dans ce cas, on ne doit considérer la capacité du substitué fidéicommissaire, qu'en égard au temps de l'échéance de la condition, et de l'ouverture du fidéicommis comme le décident Ranchin, Cujas, et plusieurs autres auteurs.*

Que si l'on exigeait la capacité en un autre temps, il s'ensuivrait, qu'on ne pourrait point admettre au fidéi-commis les enfants qui ne sont nés que longtemps après la mort du testateur, lesquels étaient bien clairement incapables lors du testament et lors de la mort du testateur, ce qui serait contre les règles et l'usage constamment reçu dans tous les tribunaux du Royaume.' At p. 309, the same author observes:—*'Quand le legs est conditionnel il suffit au légataire d'être capable lors de l'échéance de la condition, sans examiner, s'il était capable lors du testament ou lors de la mort du testateur, parce que la Règle Catonienne, qui est la raison fondamentale pour laquelle la capacité est requise lors du testament, cesse à l'egard des dispositions conditionnelles. D'ailleurs, la loi permettant de faire des institutions et des legs pour être recueillis lorsque l'héritier ou le légataire serait capable,* cum capere potuit, *il est clair que soit que la condition soit expresse ou simplement tacite, il suffit que le légataire soit capable lorsque l'échéance du legs arrive, sans examiner le temps du testament ou celui de la mort du testateur. Il y a cette considération particulière au cas des legs conditionnels, que la prévoyance du testateur n'a lieu que pour le temps auquel il a voulu que sa volonté eût son effet, c'est-à-dire lors de l'événement de la condition qu'il a marqué, de sort que quand le légataire serait incapable lors du testament, on pouvait présumer que le légataire pouvait acquérir la capacité dans l'intervalle du temps qui se passerait entre l'époque du testament et celle de l'événement de la condition, tous ses soins et sa volonté dans cet ouvrage n'étaient attachés qu'à la considération du temps futur et non pas de celui auquel il agit. Ainsi, ne voulant faire la libéralité que dans le cas que la condition arrivera, le legs, à proprement parler, n'a son commencement ou du moins sa perfection à l'égard du légataire, que quand il a son effet, ainsi que le remarque Ricard, des Donations, No.* 830, *et comme les legs et les fidéi-commis sont en tout égaux, parce que les legs et les fidéi-commis par testament ne différent que de nom, on doit appliquer aux fidéi-commis particuliers ce que nous avons dit ci-dessus au sujet de la capacité des légataires, par rapport au temps où l'on doit considérer cette capacité, selon la nature des legs conditionnels.'* *Ricard, des Donat,* No. 830, is to the above effect, and it is unnecessary to repeat him. *Lacombe, vo. Testament,* p. 312, says:—*'Le temps entre le testament et la mort du testateur ou l'événement de la condition n'est considéré: il suffit que le substitué*

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soit capable au temps du décès du grevé.' Pothier has pointed out the distinction between donations *inter vivos* and last wills, which contain a substitution in relation to the time at which the capacity to give and receive is to be considered, in No. 41 of his *Tr. des Donations entre vifs*, he says, 'in donations *inter vivos*, the act or deed of donation receiving its perfection at the time of making it, it is necessary that the capacity of the donor to give and of the donee to receive should exist at that time; but, at No. 42, not so in cases of substitution, in which the capacity to receive is not to be tested at the time either of the making of the will or of the testator's death, but when the substitution takes effect, *lors de l'ouverture de la substitution.*' So, also, in his *Tr. de la Substitution*, sect. 6, Art. I., § 1, he shews the distinction between pure or unconditional legacies and substitutions, which take effect at the death of the testator, and conditional legacies and substitutions, which, he says, only take effect at the happening of the condition or of the opening of the substitution. '*Lorsque la substitution est faite sous quelque condition, elle n'est ouverte que lors de l'accomplissement de la condition: le terme d'un temps incertain tient lieu de condition: on appelle temps incertain même celui qui arrivera certainement, pourvu qu'il soit incertain qu'il arrivera ou non du vivant du substitué, tel est le temps de la mort du grevé, telles substitutions sont conditionnelles et ne sont ouvertes que lors de cette mort,*' when the capacity of the substitute is required and takes effect. *Ricard*, Part I., No. 814, *des Donations*, says:—'*Quant aux dispositions conditionnelles, lorsque la condition s'étend au-delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au tems de l'accomplissement de la condition, parce que c'est à cette époque que le droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'événement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera. Les auteurs les plus accrédités enseignent que cette règle est suivie dans le droit Français.*' See, also, to the same effect, Nos. 829, 830. *Bourjon*, vol. ii., *Droit Commun de la France*, p. 173, *Titre des Substitut*, No. 11, says:—"*Il suffit que le substitué soit capable de recueillir au temps de l'ouverture de la substitution. L'incapacité au temps du decès du testateur, n'est d'aucune considération par rapport à son droit à la*

substitution, parce qu'il y a lieu de présumer que le testateur n'a fait la substitution au profit d'un incapable, que sous la condition que l'incapacité cesserait lors de l'ouverture de la substitution, c'est dans ce dernier temps qu'il faut considérer: c'est équitable et juridique interprétation.' He instances the case of Frenchmen settled in foreign countries, and children there born to them being within the incapacity, preventing their profiting by the substitution, but that their incapacity would be removed, if, at the opening of the substitution, they had returned to *France*. So, also, in the case of an alien in *France*, his incapacity was absolute, but was removed, if, at the opening of the substitution, he had become a naturalised subject. *D'Essaule* says, No. 101:—'*Si l'on objecte qu'on ne peut être capable de recevoir avant d'exister, la réponse est, que la capacité ne se considère qu'au temps où la substitution prend effet, et se réalise sur la tête du substitué.*' No. 503: '*La raison dicte que pour acquérir droit au fidéi-commis, il faut être capable de recevoir la libéralité qu'il renferme.*' No. 504: '*Mais à quelle époque faut-il que l'appelé soit capable?*' No. 505: '*Puisque comme on l'a vu au chapitre précédent l'ouverture est le moment où le fidéi-commis prend effet, il doit s'en suivre que la capacité soit requise à cet instant.* Non oportet prius de conditione cujus quam quæri quam hereditas, legatumve ad eum pertineat.' *Telle est la suite de la loi*, 51 *ff. de legat.* 2°, also citing *Ricard*, 829, 830; and at No. 507, *D'Essaule* adds, '*Et quand le fidéi-commis est conditionnel, comme le sont presque toutes les substitutions, il faut que l'appelé soit capable au moment de l'échéance de la condition qui est pareillement celui de l'ouverture, la mort du grevé.*' *Perrin*, a modern author, in his *Tr. des Nullités*, says, at p. 151, that, by the old laws, the capacity to receive conditional institutions and legacies is required only at the event of the condition, *par le motif que c'est seulement,* '*lors de l'événement de la condition que la disposition commence à exister;*' and, at p. 152, adds, the same principle still subsists, '*car le Code Civil maintient le principe que le légataire conditionnel n'était saisi de rien avant l'accomplissement de la condition*, Nos. 1014, 1040, or, *dès que le légataire ne peut rien acquérir qu'après cet événement, il serait inutile qu'il fût capable plutôt, et son incapacité* ab invito *doit être couverte par la capacité postérieure.*' It is evident, therefore, that the legal capacity of *William Plenderleath Christie* to receive the substi-

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tutionary bequest when it opened in his favour upon the death of the *grevé*, *Napier Christie Burton*, can admit of no discussion."

The Appellant obtained leave to appeal in every case to Her Majesty in Council, and on the 26th of January, 1874, an order was made that the said appeals should be consolidated.

Mr. *Benjamin*, Q.C., and Mr. *H. M. Bompas*, for the Appellant.

Mr. *H. Matthews*, Q.C., Mr. *Kenelm Digby*, Mr. *Barnard*, and Mr. *Maitland*, for the Respondents.

Mr. *Benjamin*, Q.C., contended that the judgment appealed from was wrong in law, inasmuch as after having decided in favour of the Appellant upon various points raised in the Court below, it finally dismissed his suit upon the sole point that by the effect of the Imperial Act (14 Geo. 3, c. 83), which empowered testators to dispose of all their property by will, though it did not remove any existing incapacity on the part of their intended donees, taken in conjunction with the Canadian Act (41 Geo. 3, c. 4), which removed such incapacity (except in certain cases under the law of mortmain), the devise by *Gabriel Christie* in favour of *William Plenderleath* was valid. He contended that the said devise was void *ab initio*, and that the provincial statute (41 Geo. 3, c. 4) had no retrospective effect, and could not be construed so as to confer any new right in the seigniories (the subject of suit) upon *Plenderleath*, or to cure the invalidity of a devise made prior to its coming into operation: see *Durocher* v. *Beaubien* (1). The statute of 14 Geo. 3, might have swept away all restrictions on a testator's power of disposition; it did not in any way affect the devisee or remove any incapacity on his part to take. The judgment of Mr. Justice *Badgley* contained two mistatements of facts on which his conclusions mainly rested; first, that the Respondents had pleaded the prescription of thirty years, whereas there was no such plea on the record, or even mentioned in the Respondent's case in the Court below, and a plea of prescription cannot be added by the Court; secondly, that it had not been shewn that *William Plenderleath* was an adulterine bastard, though this appeared from the Respondent's

(1) Stuart's Low. Can. Rep. p. 307.

own admission, and was assumed throughout the case in the Court of Queen's Bench.

A bequest to an adulterine bastard, other than as mere alimentary allowance, is a nullity. For the provisions of the civil law with regard to adulterine bastardy, see *Corpus Juris Civilis, Cod.* book v., tit. 27, sec. 8. The Roman law punished adulterous offences as crimes, see 89th Novel, ch. 15; compare *Furgole,* vol. i., pp. 416-418; ch. 6, sec. 7, and p. 420. See, also, *Code Napoléon,* which is the origin in certain parts of the Canadian Code, arts. 331, 334, 335, 762. Nothing can legally be given in his lifetime by a father to his adulterine bastard except for maintenance: see *Code Napoléon,* arts. 980, 768, 911, and Canadian Code, secs. 774, 1131 and 1133; *Demolombe,* vol. v. [ed. 1866], art. 341 *et seq.* tit. "*Legitimation.*" Further, a gift by will to an adulterine bastard by his father is an absolute nullity. It was so decided by the Court of Cassation in *France*: see also a case decided in *Sirey's* Reports, vol. lxiv., part ii., p. 11; *Demolombe, des Successions,* vol. xiv., arts. 6—10, and 122; *Demolombe, Donations et Testaments,* vol. xviii., arts. 624, 625-627, and 532. A gift of more than is valid is reducible to the proportion of the estate which is within the power of the testator to dispose of in favour of the particular legatee: *Denisart, Collection de Décisions nouvelles, vo.* "*Bâtard,*" sec. 4. In the judgment of Mr. Justice *Badgley* are collected all the authorities which bear upon bastards not adulterine, he does not venture to deny the incapacity of an adulterine bastard. [THE LORD JUSTICE JAMES:—The question of alimentation is the same, to whatever class of bastards it applies.] Our case is not so much that of incapacity of the legatee to receive, as that of a prohibited gift which is absolutely null and void in itself. The prohibition is based on its being *contra bonos mores* and against public policy.

As to the effect of the Canadian Act of 1801 on the legatee's capacity to receive, it was a provincial Act, and its effect upon the previous imperial Act of 1774 (14 Geo. 4, c. 83) must be considered. [THE LORD JUSTICE JAMES said that he saw no difficulty in a local parliament passing an Act to explain an imperial statute.] Even supposing the Canadian Act of 1801 had repealed the prohibition against the gift, still this gift was invalid at the time it was made

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and could not be cured by the subsequent statute. [THE LORD JUSTICE JAMES:—No, the gift did not take effect until after the local Act of 1801.] To give it validity you must do the act in question (invalid under the old law) over again under the new law: see *Merlin's Répertoire, tit.* "*Promesse de changer de nom.*" Here there was an actual incapacity to make the gift at the time that it was made. [SIR ROBERT P. COLLIER:—No, the incapacity was solely in the recipient, and that incapacity ceased after 1801.] We put it higher than a mere incapacity in the recipient, it was an absolute nullity of donation: *Coutume de Paris*, art. 292; *Ferrière*, vol. iv., p. 171; and see *Coutume de Paris*, arts. No. 26, 27, 44, and 272, and *Ferrière*, vol. iii., p. 1161. Moreover, any incapacity on the part of the legatee to take must be considered not at the date of the gift taking effect, that is in this case of the substitution of the ultimate legatee for the original one, but you must look to the date of the original gift. With regard to the questions of estoppel, and to the deed of 1800 mentioned above, having estopped the Appellant from alleging *Napier Christie Burton* to have been entitled as heir and not under the will, and to the pleas of continuous and peaceable possession by the Respondents and those from whom they claimed title for twenty years and ten years respectively, he submitted that twenty years was insufficient. The bastard died in 1845, and Appellant's writ was issued in 1864, and therefore the parties actually sued were not in possession twenty years. He denied that *Plenderleath* had such a possession as could form the basis of prescription, so that his possession could be added to the Respondent's subsequent possession, and thus make up the twenty years pleaded. More than twenty years had not been pleaded, and no prescription or limitation is allowed in *Canada* unless pleaded, see *Civil Code*, art. 2188; *Coutume de Paris*, arts. 113, 118. *Plenderleath* was incompetent to acquire title by possession or prescription; at least he did not obtain possession under such circumstances as would enable him to do so: *Ferrière*, vol. ii., p. 330, art. 113; see also sections of arts. 113, 23, *et seq.*; *Pothier, Traité de la Prescription*, part I. c. iii., art. 7, No. 85; see also, *Pothier, tit.* "*Testament*," art. 6. In chap. i., sec. 1, par. 6, he speaks of concubines and bastards. In chap. iii., art. 3, of the prohibition to testators to give, the personal incapacity to give is

clearly laid down: see also *Traité de Personne*, tit. iv., part i. [THE LORD JUSTICE JAMES:—Take the case of a man marrying again *bonâ fide* believing his first wife to be dead, is he incapacitated by civil law from making provision for his issue?] Yes, except for maintenance. [THE LORD JUSTICE JAMES:—The dicta you have been quoting are not of law givers but of law expounders. SIR MONTAGUE E. SMITH:—It is their testimony of what the law is.] See, again, *Pothier, Traité de la Prescription*, part. i., c. iii., art. 7, No. 85. Our case is that of a man with legitimate wife and children, a concubine living in adultery with him, by whom and by reason of what the civil law calls a *damnatus coitus* he has an adulterous bastard. Because there was no substitute in existence before 1801 who was capable of taking, therefore the institute took absolutely, and if he had sold would have passed a good title; and we say that the Act of 1801 could not take away that absolute property and absolute power of disposition which existed before 1801.

Mr. *H. M. Bompas* on the same side:—

With regard to this testamentary gift being against public policy in *Canada*, it does not appear that there is any judicial decision as to the capacity of adulterine bastards; but the *Canada Civil Code*, Art. 768, expressly regulates it, and the view taken in respect to it by the Commissioners who framed the Code may be seen in the 2nd volume of their Report, p. 155. The Canadian Act of 1801 was in some respects an explaining Act, in other respects an amending Act. Two questions arise: first, whether, apart from Acts of Parliament, this disposition in favour of *Plenderleath* was void *ab initio*, or was a conditional proviso which might or might not be void when it arose; secondly, was the gift, if void *ab initio*, validated by the Canadian Act of 1801? With regard to the old law upon the capacity of devisors and devisees with regard to the subject of adulterine bastardy, the *arrêts* of the French Courts under the kings are of the highest authority, binding on all Courts except this. The *Coutume de Paris* is subject to this consideration, that the French law is founded upon the Roman law; it is only where they differ that any express provision is to be found in the *Coutume de Paris*. The

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decisions of the French Courts and the treatises of French writers developed the Institutes of *Justinian* in a manner suitable to the circumstances and wants of the French people and country. The authorities, therefore, to rely upon are the great French writers who cite the decisions of the French Courts. See *Ricard*, vol. ii., p. 112, ch. 4, treat. 2, No. 88, where charges and conditions are distinguished. In vol. i., p. 95, ch. 3, s. 8, *Ricard* speaks at No. 397 of Roman law regarding concubinage, and distinguishes between two classes of it, namely, concubinage between those who might afterwards lawfully contract a marriage and concubinage between those who might not. Compare the passages from *Ferrière*, cited by Mr. *Benjamin*. See also *Ricard*, vol. i., p. 100, ch. 3, s. 5, No. 418, and also p. 101, cf. *Charondas le Caron, Réponses et Décisions du Droit François* [A.D. 1637], book x., c. 75, where are cited two decisions to the effect that you could not give to an adulterine bastard, its husband, wife, or child. In *Furgole*, vol. i., p. 422, such gift to be valid is limited to mere alimony. The principle on which testamentary gifts to bastards are avoided does not involve merely the question of incapacity in the devisee, but the question of public policy and of incapacity in the devisor. The main object of the adulterer was considered to be to found a family, and the main object of the law was to prevent his doing so; and hence the restrictions upon the devisor's power of disposition. See *Ricard*, vol. i., p. 101, No. 422; p. 187, No. 720; p. 194, No. 749; *Œuvres de M. Antoine D'Espeisses* [1750], vol. i., pp. 394, 395, where two decisions to that effect are cited, and other authorities: see also *Domat, des Testaments*, tit. I., sec. I., § vii. The disability of tutors in regard to transactions between tutors and pupils is not merely a disability of the tutor to receive, but involves also the disability of the pupil to give: see *Ricard*, vol. i., p. 205. And so also in regard to bastards, and the disability in respect of them. [THE LORD JUSTICE JAMES:—The disabilities you speak of in reference to tutors and pupils depend upon the law which controls the exercise of undue influence, and questions which depend upon undue influence cannot bear upon anything else.] *Merlin*, in his *Répertoire de Jurisprudence, Institution d'Héritier*, s. v., § 2, p. 400, gives a list of persons in whom incapacity of giving or receiving is only relative, and the same author points

out that where on grounds of public policy any disposition by will is declared illegal, it is null absolutely.

As regards the Acts of 1774 and 1801, the law which sect. 10 of the former was intended to alter is laid down in the *Coutume de Paris*, Arts. 248, 249, 251, 292, and 298. Section 8 of the same Act reintroduced the old Canadian law. No doubt to this there were some exceptions. Thus, section 19 provides that it should not apply to lands held in common socage; but where exceptions are not expressly stated then the old law applies. The Court will hesitate so to construe the Act of 1801 as to take away a vested right, that is the right vested in the heir before that Act by reason of the nullity of the legacy.

The counsel for the Respondents were not called upon.

The judgment of their Lordships was delivered by

THE LORD JUSTICE JAMES:—

Their Lordships have listened with great attention and interest to the very able arguments which have been addressed to them by both the learned counsel in support of the Appellant's case. Their Lordships will assume for the purpose of disposing of this appeal that the old law was exactly as stated by the learned counsel; that is to say, that according to the *Coutume de Paris*, which was planted in *Canada* by royal authority as the law of *Canada* under the French dominion, the gift in question to *Plenderleath* would be an absolutely null and void gift, by reason of the doctrines of that law as to adulterine bastardy. They will assume that it was proved in point of fact that *Plenderleath* was an adulterine bastard; and that he would have been incapable under the old law of receiving such a gift as this, that is to say, a gift by way of substitution of the family estates, as to which it could not well be predicated that they were given by way of sustentation or aliment.

Their Lordships assume further for the purposes of this decision, that the doctrine of prescription would not apply to a case of this kind; although if it were necessary to determine that point, they would have required further argument. It would have required

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further consideration to determine whether possession openly taken under a claim of right under an instrument of this nature, and under one construction of an Act of the Legislature, such possession being held during the whole of the lifetime of the person who had so taken it, and afterwards for a great many years by the successor, would or would not be brought within the description of possession under a *juste titre*. Their Lordships assume, however, that the doctrine of prescription would not apply to this case.

The matter then resolves itself into a question which the Courts in *Canada* have decided upon more than one occasion, and after a great interval of years, as to what was the conjoint operation of the English Act and the Canadian Act, and of the provision of the Canadian law which is embodied in the Code as to the period at which the capacity of a substitute is to be ascertained.

At the time when the English Act was passed, it is clear that in the settlement of *Lower Canada* the Sovereign Legislature did not think fit to establish the old Canadian law without several notable exceptions.

One notable exception to which our attention was called very late in the argument was this, that no part of the old Canadian law would apply to lands given in common socage, from which it would follow apparently that, with regard to lands in common socage, it was perfectly within the power of the owner, whether by a gift *inter vivos*, or by a testamentary disposition, to give them to any person whatever, without any restriction arising from the character of the donee. It would be singular that there should be one law based upon the grounds of public morality and public policy which would make a gift of anything but lands in common socage void, but which would make gifts of lands held in common socage perfectly good. It would be difficult to conceive how any principle of public morality or public policy could make the disposition as to one class of property void upon those grounds, and not void as to another class of property. But beyond that, the law of *England* having from the earliest period, from the time when testamentary dispositions were introduced, given absolute power to a testator to deal as he liked with his property, wholly regardless of any moral or natural claims upon him, the English Legislature introduced that law into *Lower Canada*. It is not immaterial to

observe, as was pointed out by Mr. Justice *Badgley*, in an argument which has been attacked for inaccuracy in some respects, but is nevertheless a very able and very learned argument, that in the old *Coutume* as to testamentary power, the power to the extent to which it then existed is expressed to be a power which could be exercised in favour of "*des personnes capables.*" Those are the words. When the English Legislature came to deal with it, those words were left out—their Lordships do not say intentionally—but the omission is a matter that deserves observation and consideration, and might well have been observed and considered by the Canadian Legislature in passing their subsequent Act. To the owner of property was given unlimited and unqualified testamentary power, so far as he is concerned, and so far as his children, or other persons who would under the old law have had paramount rights of succession, are concerned. But then a doubt arose, or might have arisen, as to whether that removed any personal incapacity on the part of the donee or legatee to take. The Canadian Act (which was, however, not passed until after the death of the testator in this case) put an end to such doubt as to the capacity of donees or legatees. It was argued, indeed, by the counsel for the Appellant, that the incapacity under the old *Coutume* was an incapacity of the testator; that a man was to be deterred from or punished for adultery by making it impossible for him to make any provision for his adulterine bastard, beyond a bare subsistence; that therefore it was the adulterer's capacity to *give* to his adulterine issue, not the capacity of the latter to *take* from his adulterous sire, that was extinguished by the old law; and that such incapacity was not dealt with by the new law.

If that were clearly made out, then it appears to their Lordships that the first Act did everything that was necessary. If the capacity of the testator was alone to be dealt with, the first Act had given unlimited and unqualified capacity to every testator. But the old law had not only said, it shall not be lawful for the testator to give, but had gone on to say in terms frequently repeated, it shall not be competent for the offspring of the adulterous intercourse to take. Indeed, these persons were declared to be the issue of a *damnatus coitus*, and strong expressions of that kind were used, from which it might be inferred and probably declared,

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that not only the testator was prohibited from giving, but that they were prohibited from receiving. Hence, when the English statute came, doubts and difficulties might well arise. Doubts and difficulties did, in fact, arise before the passing of the Canadian Act, not exactly in this particular case, but on the general question as to whether not only the capacity of a testator had been established, but whether the incapacity of a donee to receive had been removed. It seems to have been held that the incapacity of a donee to receive had not been removed when it arose from a special principle of law, such as the incapacity of the guardian to receive from a pupil or ward a gift by a testamentary instrument. The object of such a principle of law could not of course have been to inflict any disability on the pupil, but to prevent a guardian from abusing the influence which he had in obtaining the gift. Therefore it might well have been held that such a restriction, based upon the necessity of preventing the undue exercise of a peculiar influence could not have been within the purview of the English Legislature, which simply removed the general testamentary incapacity, the incapacity of making a testament to the disherison of the heirs. And the same question or a similar question might well have arisen as to the restriction on gifts to adulterine bastards. In this state of things the Canadian Legislature, having before it the English law, passed an Act which professed to explain as well as to amend the English Act; and it proceeds to recite that doubts and difficulties had arisen with respect to the construction of the English Act. These doubts and difficulties it was perfectly within the competency of the Canadian Legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any Imperial policy. They recite the difficulties, and then they go on to declare and enact that it shall be lawful for a testator to give to any person or persons whomsoever, with the single exception of gifts in mortmain.

The effect of this legislation upon the very will in question has been repeatedly considered by the Canadian Courts. In the year 1834 a suit was instituted disputing the title of *Plenderleath*, who had been in possession for many years. In that suit it was held by the Court of first instance that the Canadian Act had had

the effect of removing any incapacity of *Plenderleath* to take under the substitution in his favour. The Court of Appeal reversed, or, rather, discharged the judgment of the Court below upon a technical ground, that is to say, they said that no judgment ought to have been given at all, because the Plaintiffs had not made out any right to sue. Although they had in fact the very character in respect to which the present suit is brought, they had not so pleaded and so proved it as to render it possible, according to the view of the Supreme Court, to come to a final decision. The Court said it was a suit between persons who had not shewn themselves to have any *locus standi* to claim a decision at all.

The Court of Appeal, however, took great care to give an elaborate judgment (1), in which they adopted exactly the same view of the main question in the cause as that taken by the Court of first instance. That was a great many years ago, and until the institution of the present suit no further attempt was made to disturb the possession under the testamentary gift in question. In the present case the Court of first instance has taken the same view. The Court of Appeal, by a majority, takes the same view, and that has been the law apparently understood in *Canada* from the time when the matter was first mooted in this particular case, and has been received during the greater part of this century. It would appear to be the view of the law which the Commissioners took when they framed the Code, leaving the law so to stand as to testamentary gifts, although they preserved or re-enacted the old French law so far as regarded gifts *inter vivos* to adulterine bastards.

It appears to their Lordships there is great ground for holding that view as to the effect of the Canadian law; and their Lordships feel that they ought on the construction and effect of a Canadian Act affecting the law of real property there to be very much governed by that which has been the concurrent decision of the Courts in *Canada* during the lapse of years. No doubt a difficulty arises from the general principle of law that an Act should never be construed as retroactive or retrospective, unless

(1) See *Hamilton* v. *Plenderleath*, *Revue de Législation*, vol. ii. p. 1; and see *ante*, pp. 78, 79.

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express language or necessary inference compel such a construction. It is, however, to be observed that the Canadian Act is a declaratory Act as well as an enacting one, or, more properly speaking, it is in this respect strictly declaratory. For although the words in the English version of the Canadian Act are words of futurity, "It shall be lawful" in the French version (French being the language of the people), it is, "*Il est et sera loisible;*" and if it was then lawful it must have been always lawful under the English Act, although some had doubted it. Moreover, it appears to their Lordships, that the difficulty (if any) is entirely removed in this case by the peculiar provision of the old law derived from the Roman law, which has been incorporated into and now forms part of the Canadian Code (s. 838), to the effect that wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined. It is difficult to say to what class of cases that would apply if not to this. It is suggested indeed that this provision was inserted in the Code with regard to the possibility that the intended substitute might not be in existence, or might not have acquired a particular character or qualification at the date of the will or at the death of the testator, and that it applied in such cases only. There is no such limitation expressed in the Code, and it was conceded, and properly conceded, that if the incapacity were clearly a personal incapacity of a general character (as distinguished from an incapacity to take from a particular person), for instance, as that of a felon, a person *civiliter mortuus*, an alien, or a person under any peculiar personal incapacity of that kind, then in that case, if the incapacity were removed before the substitution opened, the question would have to be determined with reference to the moment when the substitution opened. In the judgment in the original case to which reference has been made a great number of authorities are cited, and there is a passage from *Ricard* (1), in which it is thus stated:—"*Quant aux dispositions conditionnelles lorsque la condition s'étend au delà du décès du testateur, le droit romain n'exigeait la capacité du donataire qu'au tems de l'accomplissement de la condition, parce que c'est à cette époque que le*

(1) See Ricard, partie 1ère, No. 814; Furgole, ch. 6, Nos. 14, 42, 44, 45.

droit est ouvert et que le testateur est censé avoir prévu que le donataire pouvait devenir capable avant l'événement de la condition. C'est comme s'il avait dit, je donne à Titius, s'il est capable de recevoir lorsque telle condition arrivera." It would be difficult to say that this doctrine would not apply to the present case, the case of an Englishman who giving to his natural child a Canadian property might well be supposed to say, "I give it to him, if, as I hope, the Canadian law has been or shall be assimilated to the law of *England* and his incapacity be removed before the gift takes effect." The matter is very fully discussed in *Ricard*, but it is not necessary to read more than has been quoted.

Indeed it was said that such a principle is not to be applied to this case; that the attempt to make this gift is such a violation of law on the part of the testator that it is to be struck out just as if it were a gift *pro turpi causâ* or *contra bonos mores*. Their Lordships are unable to take that view. Nobody surely can suppose that it is a crime in a man to express by his will his wishes as to what should be the devolution of his property after his death, or that it should go in a particular direction,—even although that direction should be in favour of an adulterine bastard,—leaving it open to the law to say whether the wish shall or shall not take effect. There is nothing immoral, nothing wrong in the expression of such a wish, nothing to prevent the ordinary application of the ordinary principles of law to the case. And, therefore, even if the old incapacity of adulterine bastardy had not been effectually removed by the English Act, it had before the substitution opened been removed by the intervening Canadian legislation.

Their Lordships are of opinion that the decisions of the Canadian Courts ought not to be disturbed, and they will humbly recommend to Her Majesty that the judgment of the Court of Queen's Bench ought to be affirmed, and this appeal dismissed with costs.

Solicitors for Appellant: Messrs. *Ritchie, Morris, & Rose.*
Solicitor for Respondents: Mr. *H. W. Austin.*

J. C.* 1874 — *July* 21, 22, 23; *Nov.* 26.

J. C. ABBOTT, J. COWAN, AND F. TORRANCE . . . . . } DEFENDANTS;

AND

J. FRASER AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Will—Validity of Gifts to Trustees in favour of a Corporation to be thereafter formed—Art. 869 *of the Canadian Civil Code.*

H. F., a merchant of *Montreal*, by his will, dated the 23rd of April, 1870, devised and bequeathed his residuary estate to trustees in trust "to establish at *Montreal* an institution to be called the '*Fraser Institute*,' to be composed of a free public library, museum, and gallery," and to be governed as therein mentioned; "and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me." After giving further directions as to the composition of the board of governors of the "*Fraser Institute*," he proceeded:—"And so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall forthwith be conveyed over to the corporation, to be thereby formed, to be called '*the Fraser Institute*' for the purposes herein declared."

In a suit by the Respondents as the heirs and representatives of the testator to set aside the above disposition:—

Held (reversing the decision of the Court of Queen's Bench for *Lower Canada*), that it ought to be sustained. It was a disposition for a lawful purpose within the meaning of Art. 869 of the Canadian Code; while as to the bequest in favour of a corporation to be thereafter formed, there was no restriction against it to be found in the Code; and as to the devise, the prohibitions contained in sects. 366 and 836 of the Code relate to the acquisition of immoveable property by corporations already formed. A devise by which property is given, not to trustees with power of perpetual succession, but simply to trustees directed to convey to a corporation only in the event of its being lawfully created with permission to possess it, is not within the scope of the said sections.

Held, further, that the gift not having been made to a society not in existence at the testator's death, but to intermediate fiduciary legatees, whose appointment is permitted by sect. 869 of the Canadian Code, did not lapse. Under Article 838 the capacity of the substituted society to receive

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* *Present*:—THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

is to be considered relatively to the time when the right to receive comes into effect.

The second article of the King's Edict of 1743 is abrogated by the *Civil Code of Canada*, as being contrary to or inconsistent with its provisions.

But apart therefrom the gift, being on an implied condition the fulfilment of which would render it lawful, is not illegal as a gift in mortmain.

Attorney-General v. *Bowyer* (1) approved.

THE suit in which this appeal arose was brought by the Respondents, as heirs of *Hugh Fraser*, deceased, against the Appellants (his executors and trustees) to set aside the provisions of his will, dated the 23rd of April, 1870, the material passage of which will be found in the judgment of their Lordships, and by which he left the bulk of his property to form a museum and public library at *Montreal*, on the ground that such provisions were void, and to recover from the Appellants the property of the testator then in their possession.

Hugh Fraser died on the 15th of May, 1870.

The declaration, which was filed on the 18th of June, 1870, alleged the illegality of the will in these words:—

"That the foregoing dispositions contained in the said will are null and void, they being illegal and made in contravention of the formal dispositions of law, the sole intent and object of such bequest and devise being the establishment of a corporation or the creation of a body to which and for the interest whereof the residue of the personal estate and the whole of the real estate of the said *Hugh Fraser* is given without any previous authority, enactment, statute, or letters patent in due course of law first had and obtained, to allow the same.

"That the said bequest and devise is so made as in the said will expressed to trustees or residuary fiduciary legatees, with the duty, obligation and condition, and for the sole purpose of transmitting the whole of the estate after deducting certain special legacies, to create and establish a lay corporation or body, to wit, a certain institution to be called 'The *Fraser Institute*,' to which, and for the establishment benefit and profit whereof, the whole residue of the estate comprising the moveable and immoveable property is intended to revert, and for such object is devised

(1) 3 Ves. 724.

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to the said Hon. *John J. C. Abbott* and the Hon. *Frederick Torrance*, in their pretended capacity of trustees or residuary fiduciary legatees, which is null and void and in direct violation of law.

"That the said disposition, bequest and devise are moreover null and void, inasmuch as the same is made to a supposed future and anticipated corporation, to be created after the death of the testator, and which had not any legal existence at the date of such will, or at the time of the death of the said testator, not established, not capable and without any legal capacity to take or receive any such bequest and devise, or any part or portion of the estate."

To this declaration the Appellants demurred and pleaded :—

1st. That under the above-mentioned will the property real and personal claimed by the Respondents had been validly bequeathed to the Appellants, and more particularly to the Hon. *J. J. C. Abbott* and Hon. *F. Torrance*, in their capacity of testamentary executors, fiduciary legatees, and trustees under the will for a purpose strictly legal, to wit, for the purpose of establishing at *Montreal*, in *Canada*, an institution to be called "The *Fraser Institute*," and for that purpose to procure such charter or act of incorporation as they in their aforesaid capacity of trustees might deem appropriate to the purpose intended by the testator, and mentioned in his will.

And they, and more particularly the Hon. *J. J. C. Abbott* and Hon. *F. Torrance*, alleged that there had not been, since the death of the testator, any session of the Legislature of the province to which they could apply for an Act incorporating the said *Fraser Institute*, and that they had duly given public notice, as required by the rules and orders of the different branches of the Legislature of the province of *Quebec*, that they would apply to the Legislature of the province of *Quebec* at its next session for an Act of incorporation.

And 2ndly. The general issue.

On the 6th of October, 1870, the Respondents answered, joining in demurrer and joining issue on the above pleas.

It appeared from the evidence that on the application of the

said *J. J. C. Abbott* and *F. Torrance*, an Act was passed by the Legislature of the province of *Quebec* on the 24th of December, 1870, to incorporate the *Fraser Institute*, carrying out in all particulars the wishes of the testator.

On the 30th of March, 1871, the Superior Court (*Beaudry*, J.) gave judgment (1) in favour of the Appellants, dismissing the Plaintiff's action with costs; based on the following considerations:

"Considering that the object of the aforesaid bequest, to wit, the establishment of a public library and museum of art, is legal and does not require previous letters patent authorizing the same.

"Considering that, under the said will, the said Hon. *J. J. C. Abbott* and Hon. *F. Torrance* became and were vested with the estate so as aforesaid bequeathed to them for the purpose in the said will mentioned, and are authorized to construct the buildings necessary for the same.

"Considering that such bequest is valid, under the provisions of Article 869 of the *Civil Code* and that the said residuary fiduciary legatees may hold the said estate and manage the same so as to carry out the desires of the said testator, until a corporation be regularly formed to administer the said public library after the erection of the necessary buildings, and that until such time no contestation as to the right of such corporation to take the legacy and bequest can take place."

On the 24th of June, 1873, the majority of the Court of Queen's Bench (Appeal Side), composed of *Drummond*, *Monk*, and *Taschereau*, JJ., *Duval*, C.J., and *Badgley*, J., dissenting, reversed the judgment of the Lower Court.

The judgment of Mr. Justice *Badgley*, contained the following passages:—

"*Louis* XIV. established the municipal law of the colony, in 1663, composed of the then existing '*lois et ordonnances du Royaume*' in general, and of the '*Coutume de Paris*' in particular, and at the same time constituted in the colony the *Conseil Souverain de Québec*, with jurisdiction in the last resort subject only to the ultimate appeal to the Sovereign at *Paris*,

(1) See 15 Low. Can. Jur. pp. 147–151.

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thereby rendering the colony, as to its local laws and jurisprudence, as independent as any of the home '*Provinces de Coutume*,' or as *Paris* itself. The king reserved the right of modifying, abrogating, or adding to the colonial municipal laws as might from time to time be considered expedient, the changes and additions becoming effective, however, only upon their registration by the Superior Council of the colony. Under this reserved authority many modifications of and additions to the municipal law are recorded amongst the royal Acts as to civil matters registered in the colony; besides which, the French kings, who were at the same time both supreme legislators and executive for the kingdom and its colonies, made many special administrative public laws for the latter as public laws, independent of the existence of their municipal laws, which were also formally registered by their Superior Courts.

"The administrative colonial laws were made in the form of edicts, and other royal acts, and regulated in the colonies their internal and foreign trade, their currency, admiralty matters, crimes and their punishments, the religious orders and establishments, and the like, and became administrative colonial law upon their registration by the Superior Council of the colony; amongst these was the declaration of 1743, of *Louis* XV., for the French colonies in general, not for this colony in particular, entitled '*Déclaration concernant les ordres religieux et gens de main-morte établis aux colonies Françaises*,' which was registered in the colony in 1744, and is the so-called Edict of 1743, referred to in the Plaintiffs' first objection, and upon whose existence they declare that they rest their case.

"Although no proceedings were had upon the Act in the colony under its French domination, by which its application and extent might be shewn, the Act itself and its special object and import must be investigated. Previous to the establishment in the colony in 1663, of its municipal law, including '*les lois et ordonnances du royaume*,' there had existed in *France*, for so long a time as to have become almost an accredited common law, a state policy, expressed in edicts and ordonnances and in general laws, against unlicensed mortmain accumulations by the religious orders and *communautés* regular and secular, which were part of

the '*lois et ordonnances du royaume,*' introduced into the colony by *Louis* XIV. in 1663. Although these public administrative laws strongly prohibited the mischief complained of, they had no permanent effect in a country where the influence of the clergy was almost paramount to that of the Sovereign, and they gradually became ineffective, except when under some extreme pressure, renewed efforts were made to abate the evil by subsequent Acts charged with more stringent incapacities and disabilities, which in their turn became as ineffective as their precursors, but still remained amongst '*les lois et ordonnances du royaume.*' The mischiefs became so serious during the minority and wars of *Louis* XIV., as he asserts in the preamble of his edict of December, 1666, '*Sur l'établissement des maisons religieuses,* etc.,' that he applied violent measures for their removal, and thereby abolished all unauthorized establishments formed during the previous thirty years, prohibited the formation of others of like character without letters patent of licence therefor, and confiscated the property of the abolished establishments. This was the first administrative Act against such new religious establishments without licence; but this edict also became dormant, until it was followed by the modern improvements upon the old general mortmain laws in the administrative Acts of *Louis* XV., his declaration of 1743 made especially for the French colonies, revised and amended by his Edict of 1749 made specially for *France* proper, in which latter edict that of 1666 was referred to, but neither of them having been registered in the colony had legal effect here.

"As already observed, the old mortmain laws were made for *France* only, where although they became inefficient, yet their general ruling principles survived and became recognised, and known in the colony, as introduced with '*les lois et ordonnances du royaume,*' and established in 1663; in virtue of which *Louis* XIV. established in the colony by letters patent several religious *communautés et gens de main-morte,* whose grants and licences were duly registered by the Superior Council of *Quebec.* But the declaration of 1743, referring to these old administrative laws, as the general inducement for its enactment, which it introduces in the following terms '*Voulons, conformément aux ordonnances rendues et aux règlements faits pour l'intérieur de notre royaume,*

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etc.,' apart from this reference was a special administrative law for the colonies, the first and only public law registered here, by which an absolute mortmain system was perfected for the colony, against the state mischief complained of in *France*. Whilst professing to uphold the known mortmain laws of that kingdom, it in effect established for the colonies a new and modern administrative system, with special disabilities, penalties, and procedure unknown to those old laws, and enacted, not to sustain and enforce them, but exclusively and expressly for the enforcement of the new system and its particular enactments. In furtherance of the new system, the declaration of 1743 was more comprehensive than the old laws, and extended its prohibitions indifferently over all '*établissements fondés sur des motifs de religion et de charité*,' as stated in the preamble prohibiting all new foundations, and also all new acquisitions of real property by existing establishments, without licence previously obtained therefor under letters patent. The declaration of 1743 was framed with great care and precision to meet both the new endowments and the new acquisitions, the enactments for the former consisting of the first nine articles of the Act, and from the tenth inclusive to the last for the latter, with stringent incapacities, fines, and penalties, and mode of application and procedure specially enacted for each. The difference between the system which it was the object of the edict to introduce, and the system in force up to that time, will more fully appear in the following distinctions between them :—

"1st. Under the general mortmain laws, the unlicensed acquisitions of real estate by mortmainors, are voidable only, or only subject to forfeiture, so that the power to hold rather than the power to acquire was in jeopardy. Under the Act of 1743, mortmainors could neither acquire nor hold without previous licence.

"2nd. Under the old general laws, the Crown, or the mesne or feudal lord, alone could interfere and force the mortmainors to '*vider leurs mains*' of their acquired property, as stated by *Pothier, Traité des Personnes*, sect. 7, No. 1, upon their failure to obtain the licence from the Crown, or to pay the indemnity to the feudal lord. The former (the required licence from the Crown) extended over *France* generally, the latter (the indemnity) only over the customary provinces where the feudal tenure prevailed.

The former was a general state tax, the latter a proprietary right under the *Coutume*, entitling the mesne lords to exact a fixed rateable value of the alienated property once for all to cover the manorial fines upon alienation if the property had not become mortmain property. Such fines and indemnity prevailed in this province until the legislative abolition of the feudal tenure, in 1854. Under the Act of 1743, heirs and *ayans cause*, or persons in interest in the property of the seller, could interfere and eject the acquiring mortmainor.

" 3rd. Under the general mortmain law, mortmainors could acquire real estate by devise as well as by donations or other contract *entre vifs*, their limitations to hold in either case being the same. *Ricard* on Donations, No. 599, '*On n'a pas seulement la liberté d'exercer ses bienfaits envers des particuliers, mais on peut aussi disposer par donations et par testament en faveur des compagnies et des communautés à nom collectif.*' So also 1 *Furgole*, chap. 6, sect. 1, No. 37. But under the Edict of 1743, all devises of lands to mortmainors were absolutely prohibited, and the reason of the distinction in this respect by the edict between donations and wills, was to protect testators against death-bed influences and impositions as is indicated by the Edict of 1749.

" 4th. Under the old general law, a legacy of either immoveable or moveable property in favour of a non-existing corporation, on condition of its future existence, was good, if made on that condition. 1 *Ricard*, Nos. 829 and 830, says: '*Quant à notre usage, la personne d'un légataire n'est considérable pour la perfection d'un testament, que lors de l'échéance du legs, de sorte que quand le légataire serait incapable au temps que le testament a été fait, on doit présumer que le testateur a prévu que le légataire pouvait acquérir sa capacité dans le temps que devait s'écouler jusqu'à l'exécution du testament.*' And to the same effect are *Cajus Consult.* 50 and 53; *Hotman*, Quæst. Illust. 6; *Dumoulin*, cited by *Brodeau sur Louet*, lett. D., Somm. 51; *Domat.* 3, 2, 1, 2, 22; *Furgole*, chap. 6, sect. 1, No. 6. And the rule was particularly applied to conditional legacies, to non-existing corporations.

" *Ricard*, No. 613, '*Lorsque les donations et les legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes; ce qui est juste, parce que ces sortes de dispositions*

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sont présumées faites sans condition, et pour avoir lieu au cas qu'il plaise au Roi d'agréer l'établissement. En effet, il serait impossible autrement d'ériger de nouveaux établissements de monastères, parce que l'on ne souffre pas qu'il s'en fasse, s'ils ne sont précédés d'une fondation, et il s'observe même que le contrat ou acte de fondation s'attache sous le contrescel de lettres patentes pour en faciliter l'obtention.' So 1 *Furgole, Des Testamens,* ch. 4, sect. 1, No. 37, '*Il faut néanmoins prendre garde que quoique les institutions et autres libéralités faites en faveur des colléges et confréries illicites, et non autorisés, soient nulles, et comme non écrites, à cause de l'incapacité actuelle par l'argument tiré de la loi* 3 § §. *Toutefois celles qui sont faites en faveur d'un collége ou confrérie ou quelqu'autre corps que ce soit non encore établi ni érigé pour servir à sa fondation ou érection ne sont pas nulles, parce qu'elles renferment cette condition tacite, si elles sont fondées, érigées et autorisées, voilà pourquoi l'effet de la libéralité étant conféré en un temps où le collége sera capable ; il n'y a point de doute qu'elle ne soit bonne ; et c'est ce qui fait la différence entre la disposition pure, comme étant nulle dans son principe, avec celle qui est conditionnelle et dont l'effet est suspendu, jusqu'à l'événement de la condition suivant les principes que nous avons établies ci-dessus, lorsque nous avons expliqué la difficulté sur le temps auquel la capacité devait être considérée par rapport aux dispositions conditionnelles.*' And *Pothier, Traité des Personnes,* page 633, who says that the distinction was solely caused by the positive new prohibition of the edict: *Pothier* says, '*De là suit pareillement, qu'en vertu de l'ordonnance de* 1749, *le legs fait à une communauté pour une fondation, quelqu'utile qu'elle soit, à la charge par la communauté d'obtenir des lettres patentes, n'en est pas moins nul, ainsi que cela est décidé formellement par l'Article* 17. *La raison de douter pourrait être que les communautés peuvent être capables d'acquérir par des lettres patentes, et qu'un legs fait à un incapable sous la condition qu'il deviendra capable* cum capere potuerit, *peut être valable. La raison qu'a eu l'ordonnance de décider au contraire que le legs était nul, se tire de la défense absolue qu'elle a faite de léguer ces sortes de choses aux communautés.*' This proves that before the edict such a legacy was good, and such is still the law of *France* at the present time. By recent *arrêt* of the Imperial Court in 1859 (*Journal de Palais, an* 1870) in the case of a city

charged with a legacy to apply an annual interest to an unrecognised *Société de Bienfaisance,* it was held that '*peu importe à la validité de la charge imposée que l'œuvre charitable ainsi gratifiée eut ou non au moment de la mort du testateur une existence légale, si plus tard et avant de réclamer le paiement elle a été reconnue et autorisée par un décret du gouvernement,*' citing *Troplong, Donations et Testaments,* No. 612. Whereas under the Act of 1743 all such legacies, as just shewn, even if protected by a condition or a trust, were absolutely null.

"Such being the difference between the general mortmain law and the Edict of 1743, the question to be determined in this cause is, which of the two systems is now in force in *Lower Canada,* and the solution of that question must necessarily depend upon the language of the present *Civil Code* in connection with the legislation since the cession, upon which both the Appellants and Respondents rest their pretensions. But the better to understand the force and effect of the Code, it will be useful to consider the effect of the cession of *Canada* to the British Crown, and of the subsequent legislation.

"The declaration of 1743 manifestly falls within the class of public administrative laws, and not of the civil or municipal law of the colonies.

"Its object and intent were public only, and not in the interest or for the benefit of individuals; it was confined within the special authority and action of the king alone, was restricted to the mere material interest of the State, unconnected with the ordinary transactions of citizens amongst themselves, and applied to a particular class, mortmainors and religious communities only. Its administrative character and functions are manifestly the enforcement of the public policy of the kingdom, and the removal of the alleged public mischief, which touched the State only, continuing undistinguished in character and public effect, whoever might be benefited by its penalties, or by the confiscation of the unlicensed devised or acquired property; the grantees now, being merely instruments selected for their supposed zeal to enforce the penalty for their own benefit, the Act not being made either for the advantage of those beneficiaries or for the mere enforcement of the penalty. Hence, therefore, the prohibitions of the Act are those

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of an administrative public law, which this infliction of its penalties cannot alter, nor convert into a civil, private, or municipal law as alleged by the Plaintiffs. As such public administrative law, it belonged to the State exclusively, and necessarily followed its fortunes whatever they might be; a cursory examination of its machinery establishes this state character, namely, the direct application to the king, his exclusive action and determination upon the application, that determination exhibited only in his letters patent directing their restriction to the particular donation or acquisition, and their registration in the colony by the Superior Council, but only in the presence and with the concurrence of his high executive and administrative officers, responsible to himself, his governor, lieutenant-general, and colonel intendant. All these demonstrate the Act of 1743 to be a public administrative Act, which existed with the dominion only to which it belonged, and could not contract or govern the prerogative rights or powers of the new sovereign of the colony, and did not require to be abrogated or repealed by express legislative authority.

"This was the state of the law of the conquered colony at its cession to *Great Britain* in 1763, when it became a British province, no longer subject to the dominion of *France* or its sovereign, or its administrative public law, which were replaced by the British Sovereign, who in the exercise of his prerogative could not be controlled by the French Act of 1743, or compelled to adopt its regulations; and the province also became subject to the administrative public law of *Great Britain*, and to such legislative enactments as should be deemed necessary for its welfare.

"The first of these latter was the *Quebec* Act of 1774, 14 Geo. 3, c. 83, which established a form of civil government, with legislative powers for the province; continued the criminal laws of the land to the exclusion of all others previously in force; regulated the trade of the province by the British Trade Acts; confirmed the Canadian subjects in the free exercise of the Roman Catholic religion, subject to the king's supremacy, under the statute of *Elizabeth*; restored the old laws of *Canada*, for resort in controversies relating to property and civil rights; but abolished the custom disabilities upon the devising power of testators, and

secured those subjects in the enjoyment of their property and civil rights, and in the customs and usages relative thereto, but expressly excepted therefrom the religious bodies and communities established in the province. In the face of that express exception it cannot be conceived to be possible that the Act of 1743 could be preserved or considered to be in force; and indeed the plain language of the Act of 1774 reserved none of the former French administrative Acts, on the contrary it established those of *Great Britain* to supply the void, and ignored the existence of the declaration of 1743, '*Concernant les ordres religieux et gens de mainmorte établis aux Colonies Françaises.*'

"The Act of 1743, as such, is not mentioned in the *Quebec* Act, and it is trite to say that its entire administrative machinery for its operative effect, the formal application, and required observances for submission to the Sovereign, his letters patent, their registration by the Superior Council in the actual presence of the royal executive and administrative colonial officers, that Superior Council itself and legislative executive powers of the French kings, with their royal persons, have disappeared from the province, and have never been revived either legislatively or judicially. The disappearance of the declaration of 1743 was effected by the cession, and confirmed by the Imperial Act of 1774, since which time the declaration has lived only in Canadian history to assist perverse litigation.

"Its final disappearance was quite understood and recognised in 1774, when the Imperial Act appeared, and this was shewn at the time, in the publication at *Quebec*, at the end of that year, by *Monsieur Cugnet*, a French Canadian lawyer, under the order of the British Governor, Sir *Guy Carleton*, afterwards Lord *Dorchester*, of a compilation of the old colonial laws and jurisprudence, in which he says:—'*On a supprimé les édits, déclarations, règlements et ordonnances du Roi (de France) qui concernent les matières criminelles, les affaires d'amirauté de la Compagnie des Indes, et les communautés religieuses qui ne doivent être d'aucune considération dans le présent gouvernement, parce que les habitans de cette Province ne doivent réclamer que les lois (françaises) qui concernent leurs propriétés et leurs droits de citoyens conformément à l'Acte de* 14 Geo. 3, c. 83.'

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"And it may be added that neither the prerogative of the English Sovereign, nor the power of the British Legislature, was likely to be used to give administrative sanction at that time in the province to Roman Catholic religious orders and *communautés*.

"The Act of 1743 did not, by its own force, survive the dominion to which it belonged at the cession in 1763, and was not recognised as existing in the *Quebec* Act, nor has it ever as such been recognised by subsequent legislation. The Imperial Act, 31 Geo. 3, c. 31, followed the *Quebec* Act, but made no reference whatever to the declaration of 1743. By the 31 Geo. 3, the province was divided into *Lower* and *Upper Canada*, with a Provincial Parliament having legislative powers for each; and if the Act of 1743 had existed for the whole province, it must have extended into *Upper Canada* as well; but it is common knowledge that its existence there was never even suspected, and no attempt for its abrogation or repeal has ever been made or thought of."

Mr. *Kay*, Q.C., and Mr. *F. W. Gibbs*, for the Appellants.

Mr. *Benjamin*, Q.C., and Mr. *H. M. Bompas*, for the Respondents.

Mr. *Kay*, Q.C., in reference to the clauses of the will, the subject of this litigation, and upon the question whether the provisions therein contained were void by Canadian law or not, referred to sects. 831, 869, and 838 of the Canadian *Civil Code*. And upon the question of the disabilities of corporations to receive property and otherwise, he referred to sects. 836, 766, 364–6 of the same Code. He argued that there was nothing in any of those sections to affect the validity of this will, and of the particular provisions referred to. There was nothing in the Code equivalent to the English statute of 9 Geo. 2, c. 36. Upon the capacity of corporations to receive property he also referred to *Consolidated Statutes of Canada*, cc. 71 and 72; the Statutes of *Canada*, 23 Vict. c. 31, the existing Act relating to joint-stock companies.

The Respondents rely upon the Edict of *Louis* XV. in 1743, which they say was registered in *Canada* in the same way as other

statutes relating to civil rights, and had been recently decided in the case of *Chaudière Gold Mining Company* v. *Desbarats* (1) to to be still in force in *Canada*. With regard to that the edict does not affect to limit the power of taking, but only the power of giving. Moreover the edict is included in the provisions of the 2613th clause of the *Civil Code of Canada*, which repeals all laws expressly or impliedly inconsistent with it. And further, the case of *Chaudière Gold Mining Company* v. *Desbarats* was decided, not with reference to the provisions of the edict, but with reference to sect. 336 of the *Canada Civil Code* (2).

With regard to the old French law before the Ordinance of 1743–1749, *Bacquet*, p. 366, lays it down as follows: "*Aussi pour maxime et vrai fondement du droit, il est besoin de tenir pour certain, ferme et stable, que par les anciennes ordonnances, lois et statuts du Royaume, de tout temps inviolablement gardés en icelui, il est défendu à gens d'église, communautés et autres gens de main-morte d'acquérir, tenir et posséder aucuns héritages, etc., dedans le Royaume, sans permission, congé ou licence des Rois de France.*" And *Pothier* (*des Personnes*), p. 633, explains what is meant by the "*défense d'acquérir*," the very words used in Art. 366 of the Code: "*Avant l'édit de* 1749, *les communautés n'étaient point absolument incapables d'acquérir des héritages, elles acquéraient valablement, sauf à pouvoir être, comme nous l'avons vu, contraintes à vider leurs mains dans un certain temps de ce qu'elles avait acquis. C'était plutôt la faculté de retenir qui leur manquait, que la faculté d'acquérir.*"

He also cited *Pothier*, *Traite des Personnes*, sect. 7, No. 1; *Ricard*, *des Donations*, No. 599; 1 *Ricard*, Nos. 829 and 830, No. 613; 1 *Furgole des Testamens*, ch. 4, sect. 1, No. 37.

Art. 836 of the *Canada Civil Code* enables corporations to receive property which under the edict they could not take. Both the Code and the Edict, although inconsistent with each other, apply both to the corporations existing at the dates of their respective enactments, and also to corporations thereafter to be established. [SIR MONTAGUE E. SMITH:—Who will take on failure of the capacity of the corporation to take?] The heirs of the

(1) Law Rep. 5 P. C. 277. (2) Law Rep. 5 P. C. 294.

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testator. [The LORD JUSTICE JAMES:—Is there such a thing as a resulting trust by the law of *Canada?*] See *Civil Code*, Arts. 833, 961, 964.

On the 10th of February, 1763, *Canada* was ceded to the British Crown, and the effect of the cession was to do away with the Edict of 1743, a great part of which was applicable only under French law and procedure. He analyzed the provisions of the edict, and shewed that clauses 3 to 9 imposed certain formalities to be observed by those who founded corporations, that other provisions referred to the old Council-General, and thus limited the power of the Crown with regard to issuing letters patent, and generally that the provisions of the edict were inapplicable, in great part, to the altered state of things in *Canada* since the cession. The Imperial Statute, 14 Geo. 3, c. 83, in regard to wills, and provincial Act, 41 Geo. 3, c. 4, enlarging the testamentary power, are both inconsistent with the edict, suppress all mention of it, and impliedly repeal it. The articles of the Code, moreover, 353, 358, 566, and 766, are inconsistent with the Ordinance of 1743 being in force, at least to the extent contended for on the other side. See *Durocher* v. *Beaubien* (1). As for Art. 366, though the terms of it, taken literally, do not exclude the possibility of the edict being in force, the fair construction of them is that they refer to the general mortmain laws which were in force before the edict passed. It was a limitation on the right to hold rather than on the right to acquire, which sect. 366 had chiefly in view. He cited *Des Rivières* v. *Richardson* (2); *Freligh* v. *Seymour* (3).

Mr. *F. W. Gibbs*, on the same side, contended that the bequest was for a "lawful purpose," under Art. 869 of the *Civil Code*; that if unlawful, it was made so by the Ordinance of 1743; that this ordinance (by Articles 1 and 2 especially) was a limitation of the prerogative of the Kings of *France* as to the creation of corporations in *Canada*, and therefore ceased to be law on the cession of *Canada* to *England*, as such limitations could not bind the English

(1) Stuart's Can. Rep. p. 307. (2) Stuart's Can. Rep. p. 218.
(3) 5 Low. Can. Rep. 492.

Crown; that this was shewn by constitutional practice, corporations having been created since the cession without the formalities of the ordinance: (a), by letters patent of the Crown, *e.g.*, Bishopric of *Quebec*, A.D. 1793; *Smith's* Hist. of *Canada*, vol. ii. p. 230; (b), by the Imperial Parliament, 6 Geo. 4, c. 75; and, (c), by numerous provincial statutes; that this was shewn also by the *Quebec* Act, 14 Geo. 4, c. 83, s. 10, in relation to the religious orders and communities: see Parliamentary Papers, 1813–1814, vol. xiv. 1; "Official Papers relating to Roman Catholics in several States of Europe and British Colonies," &c.; that this was the view entertained at date of cession, *Cugnet, Lois et Ordonnances*, 1774, and that the ordinance was not mentioned by the codifiers: Reports, vol. i. p. 229, c. "Of Corporations;" that it followed that its prohibitions were not parts of the general laws of the country respecting mortmains intended in Art. 366, No. 2, of the *Civil Code;* that the bequest did not violate Art. 366, No. 2, because it contemplated obtaining the previous "permission of the Crown." For precedents, see 58 Geo. 3, c. 15 (colonial statute), "An Act to establish a House of Industry in the city of *Montreal;*" and in *England* the case of *Downing College, Attorney-General* v. *Bowyer* (1); and that the property vested in the trustees till the creation of, and conveyance to, the corporation: Arts. 869, 964.

Mr. *Benjamin*, Q.C., for the Respondents, contended that the Edict of 1743 was still in force, and that the judgment of Mr. Justice *Badgley* was the first judgment in which the contrary had ever been held. The legacy in this case was for the establishment of a corporation, and was therefore null and void as a direct violation of the Edict of 1743. In *France*, after several ordinances and letters patent issued on this subject, *Louis* XV. re-published in 1749 an edict which, as the preamble declares, is but a re-enactment of the previous ordinances relating to the establishment and acquisition of corporations or *gens de main-morte*: see *Merlin's Répertoire, vo.* "*Main-morte (gens de)*"; *Collection de Décisions* by *Denisart*, p. 581. The disputed provisions of this will clearly attempt to establish a corporation of trustees and create a perpetuity. [The LORD JUSTICE JAMES:—They are drawn according to the common form

(1) 3 Ves. 724.

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for giving to trustees. They do not make them or attempt to make them a corporation.] The terms of the treaty of 1763, by which *Canada* was ceded to the British Crown, reserved to the inhabitants of the ceded provinces their old laws, and a series of proclamations guaranteed those laws. Then followed the imperial Acts of 14 Geo. 3, c. 83 (of which see especially sects. 4 and 8), and 33 Geo. 3, c. 31, and the local Act of 1801 (41 Geo. 3, c. 4). As to the publication of *Cugnet*, who was said on the other side to have published an abstract of all the laws in force in 1774, and who omitted the Edict of 1743, there is, on the other hand, a publication in 1803 of all the laws then in force, and that again included the edict. The *Civil Code* does not, it is true, refer to the edict in express terms, but it refers to *Pothier*, who deals with the Edict of 1749, which was the same for *France* as the Edict of 1743 was for the colonies: *Pothier's Traité des Personnes*, pt. i. tit. 7, art. 1; *la Prescription*, No 275. The Courts have repeatedly decided that the Ordinance of 1743 was law, and that its dispositions were in force: see *Desrivières* v. *Richardson* (1), a case in which a special Act of the provincial Parliament (41 Geo. 3, c. 17) was passed, but for the interposition of which the edict would have been applied. No one suggested in that case that the edict was not in force: see also *Freligh* v. *Seymour* (2), in which none of the Judges treated the Edict as not in force: *Kierskowski* v. *Grand Trunk Railway Company of Canada* (3); *Chaudière Gold Mining Company* v. *Desbarats* (4), in which the judgment refers to the edict "which has never been abrogated or repealed." The Edict of 1743 was the latest mortmain law passed before the cession; its repeal was never effected; if it had been, the other mortmain laws would have gone too, and there would be no mortmain laws in existence in *Canada*. There was nothing in the later laws repugnant to the edict, and nothing in the Acts of 1774 and 1801 against this proposition, that if a will establishes a mortmain it is bad. Moreover the Civil Law knows nothing of English trusts, and there is no machinery in *Canada* for carrying

(1) Stuart's Can. Rep. p. 218.
(2) 5 Low. Can. Rep. p. 492.
(3) 4 Low. Can. Jur. p. 86; and see also 8 Low. Can. Rep. p. 3.
(4) 15 Low. Can. Jur. p. 54; see also Law Rep. 5 P. C. 277.

out the execution of trusts. Throughout the Code there is no reference to the words "trust" and "trustee" in their technical meaning. There is a vital distinction between the French and English texts. The word "trustee" is simply used in the English text because the translator had no other word to correspond to the French word. See Article 964, where "trustee" is used, meaning nothing but a sub-executor. Trusts cannot be introduced into *Canada* without violating the spirit and substance of the arrangement made in 1763. Here the gift is to the *Fraser Institute*, which is non-existent. It cannot be a case of substitution, for there is no institute. Arts. 838, 925, 929, 944 of the *Civil Code*.

With regard to the disability of corporations under the Code, that enactment was only intended to apply to existing corporations. New corporations could not be called into existence without the assent of the law-giver. He contended, therefore, that the bequest, having been made to the Appellants for the purpose of forming a corporation, was illegal and void. The powers of creating corporations for the purpose of free libraries given by the Consolidated Statutes of *Lower Canada*, do not affect the provisions of the Edict of 1743, or give to testators any powers not previously possessed by them of disposing of their property in favour of free libraries. Even if the testator's intention to form the *Fraser Institute* corporation could be carried out by a perpetual succession of trustees, such trustees would be within the provisions of the edict and the law with regard to mortmain.

Mr. *H. M. Bompas*, on the same side, contended that the nature of trusts was foreign to the law prevailing in *Canada*. According to the principles of the civil law, first, there is no such thing as an "estate." [SIR MONTAGUE E. SMITH:—That does not necessarily exclude the notion of a trust]. Secondly, whereas under English law there are heirs to take realty and executors or administrators to take personalty, the Civil Law gives no title to the executors and makes no distinction between realty and personalty. The right which executors take under the Civil Law is to interfere with the owners in order to administer the assets; until a curator was appointed the heir had seisin, and the executor a customary right to deal with the property in order to carry out the directions of the will;

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thirdly, no means exist for the creation of a perpetual succession of trustees. He referred to Arts. 869 and 891 of the *Civil Code of Canada*, and *Ricard's* Substitutions, vol. ii., pt. i., 753. Perpetuities in *England* were created either by means of corporations or by using the machinery of the Court of Chancery in aid of charitable purposes. By the law of *France* no perpetual succession can be created except by the will of the sovereign. See *Merlin's Répertoire, vo.* "*Main-morte.*" He referred also to *Demolombe,* book III., tit. 2, Part I., Nos. 610, 611, 612.

Mr. *Kay*, Q.C., in reply, referred to the Canadian Statute, 58 Geo. 3, c. 15, as strong legislative authority to shew that this will is good. He cited *Meikle John* v. *Attorney-General of Lower Canada* (1), and also the case of *Downing College, Attorney-General* v. *Bowyer* (2).

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

The questions in this appeal relate to the validity of a devise in the will of Mr. *Hugh Fraser*, a merchant of *Montreal*, by which he devoted the bulk of his property, moveable and immoveable, to the purpose of establishing at *Montreal* an institution, "to be called 'The *Fraser Institute*,' to be composed of a free public library, museum, and gallery."

The will bears date the 23rd of April, 1870, and Mr. *Fraser* died on the 15th of May in that year.

The devise in question is in the following terms :—

"I give, devise, and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. *John J. C. Abbott*, and to the said Hon. *Frederick Torrance*, hereby creating them my universal residuary fiduciary legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely, to establish at *Montreal* in *Canada*, an institution to be called 'the *Fraser Institute*,' to be composed of a free public library, museum, and gallery, to be

(1) Stuart's Can. Rep. p. 581; 2 Knapp, 328. (2) 3 Ves. 724.

open to all honest and respectable persons whomsoever, of every rank in life, without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters and articles therein, and for the maintenance of order; and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me, namely, to the diffusion of useful knowledge, by affording free access to all desiring it to books, to scientific objects and subjects, and to works of art; and to the procuring such books subjects and objects, as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a library the leading object to be kept in view. And it is my desire that three persons should be named by my said trustees to compose with them the first board of governors of the *Fraser Institute*, which it is my desire shall always be composed of five persons, professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Hon. *John J. C. Abbott* shall be the first president of the *Fraser Institute*, and shall retain that position during his life. And so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the corporation, to be thereby formed, to be called the '*Fraser Institute*,' for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. *Abbott*, as the senior trustee, shall have a second or decisive voice, in the event of any difference of opinion between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to

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name a trustee to fill the vacancy so occurring, by a notarial instrument to that effect, and thereafter the senior trustee shall have a second or decisive casting vote, in case of difference of opinion. And I hereby confer upon my executors hereinbefore named full power to settle and adjust all matters connected with my moveable property, and upon my trustees hereinbefore named power to sell and realize such of my estate and effects as they shall deem expedient, to acquire property wherein to construct suitable buildings, and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed, up to such time as the property and estate hereby devised to them shall be conveyed over to the *Fraser Institute*. I desire that the term of office of my executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed."

The suit which gives occasion to this appeal was brought by the Respondents, as the heirs and representatives of the testator, to set aside the above bequest. The Judge of the Superior Court, Mr. Justice *Beaudry*, dismissed the suit, but his decree was by a majority of three Judges to two, reversed on appeal by the Court of Queen's Bench.

The principal objections to the validity of the gift, relied on at the bar, were :—

1. That dispositions by will made to found a corporation were prohibited by law, and the whole devise, therefore, failed. In support of this objection, the 2nd article of an edict of *Louis* XV., published in 1743, which, it was contended, had still the force of positive law, was relied on.

2. That if this were not so, the devise of the immoveable property was void, as being a gift in mortmain.

3. That the gift was to a society of persons, the *Fraser Institute*, and that the society not being in existence at the death of the testator, the whole gift failed.

The *Civil Code* (which was promulgated before the date of Mr. *Fraser's* will) is the primary source from which the law of *Lower Canada* is now to be drawn. When this Code contains

rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. (See Article 2613.)

The general power of testamentary disposition is found in Article 831 of the Code.

"Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to corporations is contained in Article 836.

"Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of articles under the head, "Of the capacity to receive and give by will." (Title 2, ch. 3, sect. 1.)

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was contained in the *Quebec* Act, 14 Geo. 3, c. 83, and the Provincial Statute 41 Geo. 3, c. 4. It was held by this tribunal in a late case (*King* v. *Tunstall and Others* (1)), that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Art. 869 was also strongly relied on by the Appellants, as

(1) See *ante*, p. 55.

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being specially designed to meet such a bequest as the present. It is as follows:—

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library, and gallery, was in itself, and apart from the manner of its foundation, "a lawful purpose." But it was contended for the Respondents that, as the disposition of the property in favour of the institution was ultimately to be carried into effect by means of a corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a corporation, but having devised his property to trustees to establish the institute, directs them to procure for that purpose legal incorporation by means of a charter or an Act of Parliament.

Now there is no express prohibition to be found in any article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which corporations are subject with regard to acquiring and holding immoveable property.

Thus Art. 836, already cited, which is found in the chapter on wills, allows corporations to receive by will only such property as they may legally possess.

Then, under the head of "Disabilities of Corporations," is—

"Art. 366. The disabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The counsel for the Respondents, however, did not rely on this part of the case upon the provisions of the Code; but insisted, and this was their main contention, that the second article of the King's Edict of 1743 was still in force, and rendered the whole devise null.

That article is as follows:—

"*Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'Article précédent, ou au profit des personnes qui seraient chargées de former le dit établissement, le tout à peine de nullité; ce qui sera observé quand même la disposition serait faite à la charge d'obtenir nos lettres patentes.*"

The establishments mentioned in the preceding article are—

"*Aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confréries, colléges, ou autres corps ou communautés ecclésiastiques ou laïques.*"

It was contended that, notwithstanding the statutes relating to wills already referred to and the Code, this edict was still the governing law upon the subjects to which it relates, and in support of this contention, some decisions in the Canadian Courts, and the case of *Chaudière Gold Mining Company* v. *Desbarats and Others* (1), recently before this tribunal, were referred to.

The question in those cases, however, turned upon the capacity of existing corporations to acquire and hold immoveable property without the licence of the Crown. Art. 10 of the edict prohibited such acquisitions without the express permission of the king, signified in a particular manner, viz., by his letters patent registered in his *Conseils Supérieurs* of the province. But in their Lordships' view it is not necessary to resort to this article of the edict for the law on the point decided in the cases referred to. Art. 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to "the general law of the country

(1) See Law Rep. 5 P. C. 277.

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respecting mortmain and bodies corporate;" but it at the same time interprets that law by the following words: Prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown." This general law may have been originally founded on the tenth article of the edict, but the law is now virtually contained in the Code itself, into which the article of the edict has been transferred.

In the case of the *Chaudière Gold Mining Company* v. *Desbarats* (1), indeed, the counsel on both sides argued on the assumption that Art. X. of the edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the judgment:—

"Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of *Canada* on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity."

It is true that Arts. I. and II. of the edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the province to the English Crown, they continue to have, since the Statutes on Wills [above referred to and the Code, the force of law.

1 App Cas 398 It is open to considerable doubt, whether the first nine articles of the edict, which all relate to the foundation of corporations, retained the force of law after this cession; first, because the forms and regulations they prescribed then became out of place; and, secondly, for the substantial reason that the articles, which had for their object to put fetters on the king's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown, whose prerogative it would be, after the cession, to establish corporations. And it is to be observed that no instance has been shewn where, since the cession, the law of these articles has been put in force.

But however this may be, their Lordships cannot but think that the second article of the edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

(1) See Law Rep. 5 P. C. 277.

The free testamentary power of disposition in Art. 831 is given, "saving the prohibitions, restrictions, and causes of nullity *mentioned in this Code.*"

It has already been observed that no restriction directed against such bequests as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with testamentary dispositions, and in a series of articles under a distinct head with "the capacity to receive and give by will" (see title 2, ch. 3, s. 1), should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second article of the edict as a part of the existing law of the province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Arts. 366 and 836 of the Code. Art. 366 is limited by its terms to the acquisition of immoveable property only; and Art. 836 must be limited by construction to such property. It is to be observed that Art. 836 appears to be founded on ch. 34, sect. 3, of the *Consolidated Statutes of Lower Canada*, which section embodied the provision of 41 Geo. 3, ch. 4, s. 1.

Both articles relate to gifts to corporations already formed. And the question is, whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of establishing an

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institute, and for effecting that purpose they are to obtain a charter or act of incorporation.

It is said that this is, in effect, devising indirectly lands to a corporation, having no licence from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such corporation would, before it vested, be sanctioned by law: whilst if it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second article of the edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a charter or act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquisition by the Corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. Justice *Badgley*. It is sufficient to cite one: *Ricard*, "*Traité des Donations*," No. 613, says:—

"*Lorsque les donations et legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes; ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement.*"

The same doctrine was sanctioned, and the grounds on which it rests were fully expounded by Lord *Eldon* in the case of *Downing College*, which in its circumstances bore some analogy to the present: *Attorney-General* v. *Boyer* (1).

(1) 3 Ves. 724.

What the position of the trustees would be in case they failed to obtain a charter or act of incorporation, was the subject of some discussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the devise, and establish and perpetuate the institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of *Canada*, it might be a question whether in such case the trustees would not be "*gens de main-morte*," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Art. 836 of the Code. In that case Art. 869 might not avail to protect the devise. It is true that by this article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the institute, but it is a cardinal part of the trust that, "for that purpose" the trustees are to procure a charter or act of incorporation, and as soon as it shall have been obtained, they are directed to convey the property to the corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient, to acquire property and to construct buildings, and to proceed to carry out the testator's designs, but only "up to such time as the property hereby devised to them shall be conveyed over to the *Fraser Institute*."

Art. 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the

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testator has manifested an intention that it shall be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the will would in this case arise, if the trustees failed, after the lapse of a reasonable time, to obtain a charter or act of incorporation, and that in that event the property would pass to the heirs under the above article.

It was suggested that new trustees might be appointed in succession so long as the execution of the will should last under Art. 923 of the Code, which is as follows:—

"The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his will should be permanently carried into execution. It is true that he directs that three persons to be named by his trustees should compose with them the first board of governors of the institute, which he desired should always be composed of five persons, and of which Mr. *Abbott* was to be president for life, with power to them to supply any vacancy caused by death or resignation; but this is the scheme he provides for the governing body of the intended corporation, as is shewn by the direction which immediately follows it, viz., "that so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the corporation. Their Lordships having regard to the scheme of the will, cannot think it was the intention of the testator to create, or attempt to create, a board of governors in perpetuity without the authority of a charter or statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

The third and remaining objection is that the gift failed, being a gift to a society not in existence at the testator's death.

If the devise had been to a society or a corporation to be afterwards called into existence or created without the interposition of

fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of first instance in *Des Rivières* v. *Richardson* (1):—

"It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle."

But it was also said in the same case in the Court of Appeal:—

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i.e.*, '*caduque*') when left to an individual, or to a body politic and corporate, not *in esse*; yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the *Royal Institution*, as soon as it should please the Provincial Government to give to airy nothing 'a local habitation and a name.'"

That case no doubt differed in some of its facts from the present, as the *Royal Institution* had been, in some sense, incorporated before the date of the will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to Art. 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Art. 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the purpose of the testator into effect if and when the corporation of the *Fraser Institute* is duly incorporated. The transfer of the property to the corporation is directed to be made by conveyance from the trustees, who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

(1) Stuart's Rep. 218.

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It is evident that the charitable and lawful purposes mentioned n Art. 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and direct that the suit be dismissed. But, considering that the law of *Canada* on the questions arising upon this will was in an unsettled state, their Lordships think that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this appeal.

Solicitors for the Appellants: Messrs. *Wilde, Berger, Moore, & Wilde.*

Solicitors for the Respondents: Messrs. *Bischoff, Bompas, & Bischoff.*

THE UNION STEAMSHIP COMPANY . . APPELLANT; J. C.*

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THE OWNERS OF THE "ARACAN" . . . RESPONDENTS. *July* 10, 11, 14, 24.

THE "AMERICAN" AND THE "SYRIA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Damage—Ship in tow of Steam Vessel—Vessel towed not liable for the Negligence of the towing Vessel.

The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery; both vessels belonged to the same owner. The captain of the *A.*, to protect his employers' interest and earn salvage from the owners of the cargo of *S.*, took the *S.* in tow, and towed her into the *English Channel*, and whilst so doing came into collision with a sailing-ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing-ship to sink, but before she sank the *S.* ranged up alongside of her and came into contact with her. The *A.* first saw the green light of the ship at a distance of three quarters of a mile, and then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles' distance the *A.* and *S.*, with a great length of hawser between them, and the red lights of both, and kept her course:—

Held, first, that the *A.* was to blame for the collision:—

Held, also (reversing the decision of the High Court of Admiralty) that, having regard to the exceptional circumstances under which the towing was undertaken, the governing as well as the motive power being wholly with the *A.*, the *S.* was not liable to be condemned in damages occasioned by the collision. The *S.* cannot be deemed, in intendment of law, to be one vessel with the *A.*, or liable for her negligence.

The Cleadon (1) distinguished.

APPEAL from a judgment of Sir *R. Phillimore* (May 16, 1874) (2).

Mr. *Milward*, Q.C., and Mr. *Gainsford Bruce*, for the Appellant company, contended that the decree appealed from ought to be reversed, both as regards the *America* and the *Syria*. In regard to the latter vessel they argued that, being under the direction of the *American*, she was not liable for her default (if any). The

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 14 Moore's P. C. Cases, 97. (2) Law Rep. 4 A. & E. 226.

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American and the *Syria* were, in intendment of law as well as in fact, two separate ships. They cited *The Christina* (1848) (1); *The Cleadon, Stevens* v. *Gourley* (2); *The Arthur Gordon and The Independence* (3); *The Minnehaha* (4); *The Duke of Manchester* (5); *The Express* (6); *The Steamer Alabama and The Steam-tug Gamecock* (7); *William Sprout* v. *A. Hemmingway* (8); *The Hector, Sturgis* v. *Boyer et al.* (9)

Mr. *Butt*, Q.C., Mr. *Clark*, and Mr. *Phillimore*, for the Respondents, argued that the *American*, being a steamship within the meaning of the statutory rules, was bound to keep out of the way of the sailing-ship. The mere fact that she had a ship in tow did not alter either the right or the duty under those rules. The *Syria* was liable for the default of the *American*, even if there were no contributory negligence on her part. They cited *Holt's* Rule of the Road, and cases cited therein: *The Emperor and The Zephyr* (10); *The Gala* v. *The Zenobia* (11); *The Great Conquest and The North East* v. *The David Cannon* (12). With regard to the American cases, see 1 *Parsons* (1869) on the Law of Shipping, p. 534; *The Unity* (13).

Mr. *Milward*, Q.C., in reply, referred to *The Quickstep* (14); *The Niagara and Elizabeth* (15); *The Energy* (16); *Kent's* Commentaries [Ed. 1873], vol. iii., p. 232, note (*d*); 1 *Parson's* Maritime Law [Ed. 1859], p. 208, or [Ed. 1869] p. 534; *Steamboat New York* v. *Rea* (17).

1874 *July* 24.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The *American* and the *Syria* are two large steam vessels

(1) 6 Notes of Cases, 4; 3 W. Rob. 27.
(2) 14 Moore's P. C. Cases, 93; 1 Lush. 158.
(3) 1 Lush. 270.
(4) 1 Lush. 335.
(5) 2 W. Rob. 470.
(6) 1 Blatchford, 365 (Circuit Court of the United States).
(7) 1 Benedict, 477 (United States District Court Reports).
(8) 31 Pickering's Massachusetts Rep. 1.
(9) 24 Howard's Supreme Court Reps. (U. S.) p. 110; 4 Blatchford, 199.
(10) Holt's Rule of the Road, p. 24.
(11) Ibid. p. 112.
(12) Ibid. pp. 235, 238.
(13) Swabey's Admiralty Rep. pp. 101, 102.
(14) 9 Wallace, 665.
(15) Admiralty Reps. Lower Canada, pp. 314, 319.
(16) Law Rep. 3 A. & E. 48.
(17) 18 Howard, 223.

belonging to the *Union Steam Navigation Company*, plying between the *Cape of Good Hope* and *London*.

The *Syria*, on her voyage home, became disabled, through some damage to her machinery, and put in at *Ascension Island*. The captain of the *American* also, on his voyage home, calling at *Ascension*, and finding the *Syria* disabled, determined to tow her home, and attached her to his ship by long hawsers. He entered the *British Channel* with the *Syria* thus in tow, and was at a distance of about sixteen miles off *Portland* at 11 P.M. on the 8th of March, 1874, when the collision, the subject of the suit, occurred. The *American* had two white lights on her foremast, and both vessels had the usual red and green lights; the night was moderately clear, the wind W. or W.S.W. The *American*, with the *Syria* in tow, was steering east by N. $\frac{1}{2}$ N., and going at the rate of about five knots an hour.

The *Aracan* was a sailing ship of 788 tons register, and was going down the channel on a voyage from *London* to *Hong Kong*, and was beating against the wind.

There were cross suits in the Admiralty Court.

The account of the *Aracan* is substantially this: that she was close hauled by the wind on the starboard tack, heading about south, when she saw "the white light" (she never saw the two white lights) "of the *American*" at a distance of between four or five miles; that at a distance of two miles she made out the red lights of both vessels, and understood that one was towing the other; that, acting under the 15th and 18th Admiralty Rules, she kept her course, expecting the towing steamer to get out of her way by starboarding her helm and passing to the stern, until, finding a collision imminent, she ported her helm, as the best mode of lessening its force.

The case of the *American* and *Syria* is, that the captain of the *American* saw the green light of the *Aracan* first at a distance of a mile or three-quarters of a mile, although a good look-out was kept. That, impeded as he was by his "tow," he was unable to starboard his helm sufficiently to pass to the stern of the *Aracan;* that he could not slacken his pace, because he would not have had sufficient steering way, and might have run a risk of fouling his tow or the hawsers, and that nothing remained to him but to port

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his helm, thereby giving the *Aracan* "more room;" that he did this, and that his ship went off one point on the port helm; that the *Aracan* starboarded her helm and so caused the collision, whereas she ought to have ported it, and either turned round on the opposite tack or have passed under the stern of the *Syria*.

The learned Judge of the Admiralty Court found that the *Aracan* was in no respect to blame, and that the collision was wholly caused by the negligent navigation of the *American*. He appears to have found as a fact there was no negligence on the part of the captain or crew of the *Syria* conducing to the accident; but after hearing further argument on this subject, he came to the conclusion that, in point of law, the *Syria* must be pronounced also to blame, on the ground that she must be taken to have been, in intendment of law, one vessel with the *American*.

The present appeal is from this judgment.

The Appellants have much relied on the case of *The Independence*, decided by this Board, and reported in 14 Moore's Privy Council Cases (1), where a distinction is pointed out between the situation of a steamer unencumbered, and of a steamer with a ship in tow. Lord *Kingsdown* there observes:

"A steamer unencumbered is nearly independent of the wind. She can turn out of her course, and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason, considered bound to give way to a sailing-vessel close hauled, which is less subject to control, and less manageable.

"But a steamer with a ship in tow is in a very different situation. She is not in anything like the same degree the mistress of her own motions; she is under the control of, and has to consider the ship to which she is attached, and of which, as their Lordships observed in the case of *The Cleadon* (2), she may, for many purposes, be considered as a part, the motive power being in the steamer, and the governing power in the ship towed. She cannot, by stopping or reversing her engines, at once stop or back the ship which is following her."

It is true that this case was decided before the promulgation of

(1) Page 103. (2) 14 Moore's P. C. Cases, 97.

the present regulations for preventing collisions at sea, which in terms direct that where the courses of two vessels involve risk of collision, the steamship shall keep out of the way of the sailing-ship, and that the sailing-ship shall keep her course, subject to due regard to dangers of navigation, and to special circumstances rendering a departure from the rule necessary in order to avoid immediate danger.

But the rule of navigation, though formulated, can scarcely be said to have been altered by the regulations, and the distinction taken between the relations of an encumbered and an unencumbered steamer is manifestly a just one, and still applicable. It does not go the length of absolving altogether the encumbered steamer from obedience to the rules which apply to all steamers, but it necessitates allowances being made under the circumstances of each case for the comparatively disabled condition of the encumbered steamer, and imposes upon the sailing-ship approaching her the duty of additional caution. It may be observed that, in 1863, an additional article was promulgated requiring the towing-steamer to exhibit two white lights instead of one, doubtless for the purpose of warning all approaching vessels that she was encumbered, and not in all respects mistress of her movements.

Their Lordships have given the benefit of all these considerations to the *American*, but are unable to come to the conclusion that the Judge of the Admiralty Court was wrong in pronouncing her to blame. They do not think (and in this they are confirmed by their assessors) that her not seeing the green light of the ship until the vessels were within a mile or three-quarters of a mile of each other, is sufficient to convict her of negligence in not keeping a sufficient look-out. But they think that to attempt, with the long mass behind her, to cross the bows of the ship was an extremely hazardous, and not a necessary act. Their Lordships are of opinion that she might have slackened speed, as it was her duty to do, even if she could not have starboarded, and that the collision might then have been avoided.

The *American* charges the *Aracan* with starboarding; she denies it. There is much conflicting evidence on the subject, and the learned Judge, who had the advantage of seeing and hearing the

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witnesses, believes the case of the *Aracan*. Their Lordships, though not quite satisfied on this subject, after consultation with their nautical assessors, are not prepared to reverse this finding.

She saw at a considerable distance, according to her account two miles, two large steamers, one towing the other, with a great length of hawser between them, and she saw the red lights of both. It has been contended that inasmuch as she must or should have seen that the leading steamer was not starboarding but was porting, or, if not, keeping on her course, that she ought not to have persisted in her endeavour to pass before the bows of the steamer, but should have ported her helm, stopped her course, and turned round on the other tack. Considering, however, that the *Aracan* might reasonably have expected the *American* to keep out of her way by either starboarding her helm and slackening her speed, and that if the *Aracan* had stopped with a view to tacking, this very manœuvre might have thrown her in the way of the *American* if the *American* had starboarded, their Lordships are unable to pronounce the *Aracan* to blame for keeping her course as it was her duty to do, unless departure from it was necessitated by special circumstances to avoid immediate danger.

For these reasons their Lordships are of opinion that the *American* was to blame for the collision.

The question remains whether the *Syria*, though free from blame in fact, must nevertheless be held to blame by intendment of law. The decision of the learned Judge upon this point appears to be based upon the principle shortly stated by Lord *Kingsdown*, in the passage which has been before cited as that on which *The Cleadon* (1) was decided, viz., that the motive power was in the tug, the governing power in the ship towed. The Judge of the Admiralty Court applying this principle to the present case, held that the *American* and the *Syria* constituted one vessel in intendment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow. The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her. Some American cases have been cited which, though differently decided, illustrate this principle.

(1) 14 Moore's P. C. Cases, 97.

It appears that, in the large American rivers and lakes it is usual for a tug, which is spoken of as a public vessel, to take a number of small vessels in tow, some alongside of her, some astern. She assigns to each of these vessels its place, and they are under her direction. Under these circumstances, the American Courts have held that a vessel towed is not liable for the negligence of the tug, because the "governing power" is in the tug, not in her. The master of the *American* appears to have undertaken to tow the *Syria* under circumstances quite exceptional. Their Lordships collect that he determined to take home the *Syria*, partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the *Syria's* cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the *Syria*, or having acted in any way under the captain of the *Syria's* control. On the contrary, it would appear that the "governing power" was wholly with the *American*. Under these circumstances, their Lordships are of opinion that the principle on which *The Cleadon* (1) was decided does not apply to this case; that the *Syria* cannot be deemed in intendment of law one vessel with the *American*, or liable for her negligence. Nor do they think that the fact of the *American* and *Syria* belonging to the same owners affects the question whether or not the *Syria* was to blame.

Their Lordships will, therefore, humbly advise Her Majesty that, in the suit of the owners of the *Aracan* against the owners of the *American* and *Syria*, the judgment be varied by declaring that the *American* alone was to blame; that in the suit of the owners of the *American* and *Syria* against the *Aracan* the judgment be affirmed. There will be no costs of these appeals.

Solicitors for the Appellants: Mr. *Thomas Cooper*.
Solicitors for the Respondents: Messrs. *Pritchard & Sons*.

(1) 14 Moore's P. C. Cases, 97.

J. C.* EDWIN BARTON . . . . . PLAINTIFF;

1874

AND

Nov. 7, 14. JOHN MUIR . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES. IN EQUITY.

New South Wales—Crown Lands Alienation Act, 1861, *s.* 18—*Conditional Purchase by a Trustee not an Evasion of the Act.*

In a suit for a declaration that the Respondent was trustee for the Appellant of land conditionally purchased by the former under the *New South Wales Crown Lands Alienation Act*, 1861, with the moneys of the latter, and for a consequent order for conveyance in accordance with a written agreement whereby the Respondent had bound himself to fulfil the statutory conditions of purchase, and thereafter to transfer to the Appellant; the Respondent pleaded that such agreement was illegal, and contrary to the spirit and policy of the said Act, and that, therefore, the Appellant was not entitled to the transfer sought:—

Held (reversing the decree of the Supreme Court), that there should be a declaration that the legal title of the Respondent as purchaser was held by him as trustee for the Appellant, and a direction that the Respondent do proceed to complete the purchase according to the terms thereof, and thereafter to execute a proper conveyance to the Appellant. The agreement, admittedly not immoral or against public policy, is not contrary to the terms of the 18th section of the said Act, and cannot be annulled or tainted with illegality on any conjectural view of the policy of the Act.

THE suit in which this appeal arose was brought by the Appellant against the Respondent in the Supreme Court of *New South Wales*, and related to the property in, and the right to have possession of, about 320 acres of land in the colony. The bill of complaint stated that the land was acquired by the Respondent under the *New South Wales Crown Lands Alienation Act*, 1861, with the moneys of the Appellant, and charged that the Respondent was a trustee of the land for the Appellant, and prayed that the Respondent might be decreed to transfer the land to the Appellant, or to such person as he might direct, in accordance with the terms of the Respondent's written agreement, which had been duly registered.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR JOHN STUART, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

It appeared that in the year 1869 the Appellant was desirous of acquiring the lands in suit in fee as a free selector, and that the Respondent, who was then the Appellant's overseer, agreed to take up the lands on behalf, and at the expense, of the Appellant. The agreement was as follows:—

"Memorandum of agreement between *John Muir*, of *Wolgan*, and *Edwin Barton*, of *Wallerowang*, made the 5th of August, 1869.

"I, *John Muir*, do hereby acknowledge to have received from *Edwin Barton* the sum of eighty pounds, with which money I have this day purchased for the said *Edwin Barton*, his heirs, executors, administrators, or assigns, 320 acres of land in *Wolgan*, adjoining the 1000 acres grant to the late *William Walker*, which 320 acres of land are in lots of 40 acres each. And I, *John Muir*, do for myself, my heirs, executors, administrators, or assigns, hereby agree to fulfil all the conditions required by the *Crown Lands Alienation Act* of 1861, under which Act the said 320 acres of land are conditionally purchased, and at the expiration of three years from this date, or at any earlier date, to transfer all my right, title, and interest in said 320 acres to the said *Edwin Barton*, his heirs, executors, administrators, &c.; the said *Edwin Barton* paying all expenses."

The Respondent made the usual written application under the *Crown Lands Alienation Act*, 1861, for the conditional purchase of the said 320 acres of land at the price of 20*s.* per acre, and he was thereupon declared the purchaser thereof at the price named, and paid the deposit of 25 per cent. of the purchase-money with the sum of £80 admitted by him to have been received for that purpose from the Appellant.

The Respondent fulfilled all the conditions prescribed by the Act with regard to the conditional purchase of the said 320 acres of land, and he resided on the land and made improvements thereon as provided by the Act. He resided on the land in a hut erected thereon since the said 5th of August, 1869, at the cost of the Appellant, and made improvements by laying out a sum of £400, or thereabouts, supplied by the Appellant for that purpose, in fencing and otherwise. The Appellant also paid to the Respondent

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wages for work and labour performed and expended by him on the land and elsewhere while residing thereon to the amount of about £200.

The period of three years mentioned in the memorandum of agreement having expired, the Appellant requested the Respondent to transfer to him all his (the Respondent's) right, title, and interest in the said land, the Appellant offering to pay all expenses of the transfer. The Respondent, however, refused to comply with this request, and stated that he would keep the land for himself.

Previous to the institution of the above-mentioned suit the Appellant had (as admitted) performed his part of the agreement in every particular, and the Respondent had done all things necessary to complete his title to the land, except that he had not tendered the balance of the purchase-money at the office of the Colonial Treasurer, nor made the declaration required by the 18th section of the *Crown Lands Alienation Act*. The Respondent, however, refused to transfer such title to the Appellant; and submitted in his defence to the Appellant's bill of complaint that the said agreement was illegal, as being contrary to the spirit and policy of the *Crown Lands Alienation Act* of 1861, and that therefore he was not bound to make the transfer to the Appellant.

The material sections of the Act are as fellows:—

By the 13th section of the said *Crown Lands Alienation Act* provision is made for a free selection (by way of conditional purchase) of blocks, ranging from 40 to 320 acres, at the price of £1 per acre, of which 25 per centum of the purchase-money is to be paid by way of deposit. That section is as follows:—

"Sect. 13. On and from the 1st day of January, 1862, Crown lands, other than town lands or suburban lands, and not being within a proclaimed gold field, nor under lease for mining purposes to any person other than the applicant for purchase, and not being within areas bounded by lines bearing north, east, south, and west, and distant ten miles from the outside boundary of any city or town containing, according to the then last census, 10,000 inhabitants, or five miles to the outside boundary of any town containing, according to the then last census, 5000 inhabitants, or three miles from the outside boundary of any town containing, according to

the then last census, 1000 inhabitants, or two miles from the outside boundary of any town or village containing, according to the then last census, 100 inhabitants, and not reserved for the site of any town or village, or for the supply of water, or from sale for any public purpose, and not containing improvements, and not excepted from sale under sect. 7 of this Act, shall be offered for conditional sale by selection in the manner following (that is to say):—Any person may upon any land office day tender to the land agent for the district a written application for the conditional purchase of any such lands, not less than 40 acres, nor more than 320 acres, at the price of 20*s.* per acre, and may pay to such land agent a deposit of 25 per centum of the purchase-money thereof. And if no other like application and deposit for the same land be tendered at the same time such person shall be declared the conditional purchaser thereof at the price aforesaid: Provided, that if more than one such application and deposit for the same land, or any part thereof, shall be tendered at the same time to such land agent, he shall, unless all such applications but one be immediately withdrawn forthwith, proceed to determine by lot, in such manner as may be prescribed by regulations made under this Act, which of the applicants shall become the purchaser."

By sect. 16 of the said Act, each conditional purchaser is obliged to occupy the land within one month after the time of purchase. That section is as follows:—

"Sect. 16. If at the time of conditional purchase of any Crown land under sects. 13 and 14 of this Act, such land shall not have been surveyed by the Government, temporary boundaries thereof shall be determined by the conditional purchaser, who shall, within one month after such time of purchase, occupy the land. And any dispute between such purchaser and any other person other than a holder in fee or his alienee claiming any interest therein respecting such boundaries, shall be settled by arbitration: Provided, that if such land shall not be surveyed by the Government within twelve months from the date of application, it shall be lawful for the conditional purchaser, by notice in writing to the land agent for the district, to withdraw his application, and thereupon he shall be entitled to demand and recover back any deposit

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paid by him, or the purchaser shall have the option of having the land surveyed by a duly qualified licensed surveyor, and the expense of such survey shall be allowed to such purchaser as part payment of his purchase-money, such expense to be allowed in accordance with the scale of charges fixed or to be fixed by the Surveyor General.

Sect. 18 of the said Act is as follows:—

"Sect. 18. At the expiration of three years from the date of conditional purchase of any such land as aforesaid, or within three months thereafter, the balance of the purchase-money shall be tendered at the office of the Colonial Treasurer, together with a declaration by the conditional purchaser, or his alienee, or some other person, in the opinion of the minister competent in that behalf, under the Act 9th Vict. No. 9, to the effect that improvements as hereinbefore defined have been made upon such land, specifying the nature, extent, and value of such improvements, and that such land has been from the date of occupation the *bonâ fide* residence either continuously of the original purchaser or of some alienee or successive alienees of his whole estate and interest therein, and that no such alienation has been made by any holder thereof until after the *bonâ fide* residence thereon of such holder for one whole year at the least. And upon the minister being satisfied by such declaration, and the certificate of the land agent for the district or other proper officer, of the facts aforesaid, the Colonial Treasurer shall receive and acknowledge the remaining purchase-money, and a grant of the fee simple, but with reservation of any minerals which the land may contain, shall be made to the then rightful owner: Provided, that should such lands have been occupied and improved as aforesaid, and should interest at the rate of 5 per cent. per annum on the balance of the purchase-money be paid within the said three months to the Colonial Treasurer, the payment of such balance may be deferred to a period within three months after the 1st of January then next ensuing, and may be so deferred from year to year by payment of such interest during the first quarter of each year. But on default of a compliance with the requirements of this section the land shall revert to Her Majesty and be liable to be sold at auction, and the deposit shall be forfeited."

On the 18th of November, 1872, the Primary Judge (Mr. Justice *Hargrave*) delivered a judgment in favour of the Appellant, and decreed—

"1. That the Defendant, *John Muir*, do execute a proper transfer or other conveyance or assurance to the Plaintiff of all his, the Defendant's right, title, and interest in the land and hereditaments, and every part thereof referred to in the bill of complaint in this cause, within fourteen days after such transfer or other conveyance or assurance shall be tendered to him or to his solicitor for that purpose. And that the said Defendant do also, within seven days after the same shall be tendered to him or to his solicitor for that purpose, sign such declaration, letter of notification, or other instrument, as may be required by the Minister for Lands, under the provisions of the *Crown Lands Alienation Act* of 1861, to entitle the Plaintiff to have issued in his name a grant from the Crown in fee simple of the said lands and hereditaments.

"2. And it is further ordered that the Defendant do within seven days after service of this decree upon his solicitor deliver upon oath to the Plaintiff or to his the Plaintiff's solicitor, all deeds and documents relating to the title to the said lands and hereditaments which are now in his, the Defendant's, possession, power, or control.

"3. And it is ordered that either of the said parties are to be at liberty to apply to this Honourable Court as occasion may require."

On the 10th of July, 1873, the Supreme Court (*Stephen*, C.J., and *Faucett*, J., *Hargrave*, J., dissenting), reversed this decree without costs either of the appeal or of the suit.

The Chief Justice stated, "I think it scarcely possible to read the clauses of the *Lands Alienation Act*, prescribing the two distinct modes of acquiring Crown land in this colony, without perceiving that the arrangement in this case was calculated, and, as I conceive, designed, to defeat the intentions of the Legislature. It was, unquestionably, in effect to enable the Plaintiff to accomplish indirectly what he could not under the Act have done directly, and what the statute meant to prevent persons from doing, except under conditions which that arrangement enabled

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him to evade. A contract of that character is, I apprehend, on grounds of public policy, invalid; and the aid of this Court to enforce its performance, therefore, is invoked in vain."

After discussing the various sections of the Act in relation to this transaction, he concluded:—

"Now, it is by this *Lands Alienation Statute* plainly seen to be its policy (putting aside for the present other objects) that all freeholds shall be of a limited extent. But it is obvious that, by effecting a series of these simulated conditional purchases, any number of which may be simultaneous, any person possessing adequate pecuniary means may contrive to acquire Crown lands to any extent. So he may, it was urged, by purchases from *bonâ fide* selectors after their one year or three years of probation. Such persons, however, would be less likely so to deal with their homesteads; and it is not because the law may have left one avenue open to a given result that therefore any individual is at liberty to make for himself, at discretion, another path to it.

"But the most palpable objection to this transaction is its fraud, in effect, on the 18th section. The Plaintiff must have known, if the Defendant did not—and both were bound to know—what the solemn declaration is that the law there requires. Now, as the former did not live on the purchased land, nor ever contemplated doing so, but nevertheless was, in truth and in fact, the conditional purchaser, no declaration could be made either as to his residence there or that of any alienee from him. The necessary continuous residence, therefore, from the time of the making of the contract must have been intended by both parties to be ascribed to the Defendant, who was not, honestly speaking, any purchaser at all, or to some one as his alienee. Supposing this breach of the enactment to be overcome by the fiction relied on—that the Defendant might lawfully be called the purchaser because his name was used as such—what can be said to the other contemplated falsity, namely, the declaration that no alienation had been made by any holder until after his prescribed year's residence? For if it be conceded that the Defendant was the purchaser or holder, how could this possibly be said by him or any one for him? Whether, within the meaning of the statute, he was the conditional purchaser

or not, it is undeniable, and not in fact denied, that he purchased (or assumed to purchase) for the Plaintiff, and with the Plaintiff's money. There was the distinct contemporaneous understanding and agreement that he would transfer the property to the Plaintiff; but this meant only that the Defendant would execute a formal instrument of transfer, as if he were really the owner, at the expiration of the statutory year. Courts will not be thus hoodwinked, or accept a mere contrivance, as if the thing was real. The transfer was simply part of the game. But the property never was the Defendant's. His name was used as owner, but it was solely as trustee for the Plaintiff, and it was used for purposes of deceit, in fraud of the statute. I willingly believe that probably neither party at the time so regarded their arrangement; but both must have been conscious that it was in order to violate or evade the law.

"I am of opinion that his Honour's decree ought to be reversed and the bill dismissed, but without costs either of the appeal or of the suit. The Defendant succeeds, although he has broken faith, because he was legally justified in resisting the demand. He succeeds, not because his defence is a meritorious one, but simply because, both parties being to blame in the transaction, the Court will assist neither."

Faucett, J. after discussing various points, concluded: "I rest my decision not merely on the ground, which possibly might be questionable, that the agreement is contrary to the policy of the Act, but on the broad and clear ground that its object is by an evasion of the statute to acquire land in a manner by necessary implication, and also, in my opinion, expressly prohibited by the statute, and it is therefore contrary to the statute and illegal." He cited *Holman* v. *Johnson* (1); *Gaslight Company* v. *Turner* (2); *Weatherell* v. *Jones* (3); *Ritchie* v. *Smith* (4); *Curtis* v. *Perry* (5); *Ex parte Yallop* (6); *Ex parte Houghton* (7); *Armstrong* v. *Lewis* (8); *Armstrong* v. *Armstrong* (9); *Johnson* v. *The Shrews-*

(1) 1 Cowp. 343.
(2) 5 Bing. N. C. 675.
(3) 3 B. & Ad. 225.
(4) 6 Man. & Gr. 476.
(5) 6 Ves. 739.
(6) 15 Ves. 60.
(7) 17 Ves. 251.
(8) 2 Cr. & M. 274.
(9) 3 My. & K. 45.

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bury and Birmingham Railway Company (1); *De Themmines* v. *De Bonneval* (2).

Hargrave, J., adhered to his judgment delivered as primary Judge, "that neither upon the construction of the *Crown Lands Alienation Act*, nor upon the authorities applicable, is there any objection to the Plaintiff, Mr. *Barton*, the squatter, obtaining specific and full performance of the agreement he made with the Defendant, *John Muir*, 'his working overseer,' to free select the 320 acres, the equitable right to which land is the only question in this cause."

Mr. *Leith*, Q.C., and Mr. *Montague Cookson*, for the Appellant, contended that the agreement of the 5th of August, 1869, was not contrary to the policy of the *Crown Lands Alienation Act* of 1861. The Court cannot impute to a colonial government a policy which they have not themselves expressly declared, or enact for them that which they have not enacted for themselves. The kind of purchase impeached in this case is not prohibited in express terms by the Act nor by necessary implication therefrom. The Respondent from the time when he was declared the conditional purchaser of the lands comprised in the agreement acquired a statutory fee therein, which was subject to defeasance on non-performance of the conditions prescribed by the said Act. On the other hand, the Respondent having performed those conditions has acquired, or at least is in a position to acquire, an absolute fee in the lands, which he is competent to transfer, and which under the agreement he is bound to transfer to the Appellant.

They referred to *Drinkwater* v. *Arthur* (3), and *Haigh* v. *Kaye* (4). The words "lawful owner" and "rightful owner," mean nothing more than statutable owner, who under the true construction of this Act and by virtue of the agreement made is the Appellant. See *Brewster* v. *Clarke* (5); *Hughes* v. *Morris* (6); *M'Calmont* v. *Rankin* (7). The expressions in the *New South Wales Act* must be construed in reference to the policy and subject matter of the Act. In our Bankruptcy Acts and Bills of Sales

(1) 3 De G. M. & G. 923.
(2) 5 Russ. 288.
(3) 10 N. S. Wales Supreme Courts Reps. p. 193.
(4) Law Rep. 7 Ch. 473.
(5) 2 Merivale, 75.
(6) 2 Mac. & G. 349.
(7) Ibid. 417.

Acts in respect of the doctrine of reputed ownership from 21 Jac. down to the *Bankruptcy Act* of 1869, the expression "true owner" is satisfied by the person who has a legal title. Again, in *Ryall* v. *Rolle* (1) (and see Lord *Hardwicke's* judgment (2)), a mortgagee was held not to be the true owner, and in *Ex parte Dale* (3) a trustee was held to be the true owner. The question is, who, in the particular case is, in the eye of the law, under the circumstances to be regarded as the real owner. The words of a particular statute may be curtailed in their comprehensiveness by the declared policy of the statute or by its policy, ascertained by necessary implication from its terms: see 17 & 18 Vict. c. 36, *Bills of Sale Act*, sect. 2, in which the general expression "declaration of trust" has been construed to mean "declaration of trust for debtor or assignor" in *Robinson* v. *Collingwood* (4). See also, with regard to the danger of giving effect to what is called the equity of a statute, *Brandling* v. *Barrington* (5); and *Dwarriss* on Statutes, pt. 2, pp. 702, 707.

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR JOHN STUART:—

The view of this case taken by the majority of the Judges seems not reconcilable with the established principles of equity. It is a view founded on what appears to be rather a misapprehension of the authorities which they cite as applicable to the case.

Properly understood, the authorities establish the principle that to deprive the Appellant of his right to relief in equity there must be such a degree of illegality in the transaction as is free from all doubt.

It is rightly admitted that the transaction is not immoral or against public policy. In the beginning of his judgment the Chief Justice says it is against public policy, but that seems an accidental inaccuracy.

(1) 1 Atk. 164.
(2) Page 170.
(3) Buck's Cases in Bankruptcy, p. 365.
(4) 13 W. R. 84.
(5) 6 B. & C. 475.

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It is not quite easy to follow the reasoning of the Judges. One says that the most palpable objection is that there is "fraud in effect on the 18th section of the Act." Another says, in the last passage of his judgment, that he rests his decision not merely on the ground that it is contrary to the policy of the Act, which he considers might possibly be a questionable ground, but that by necessary implication it is expressly prohibited by the statute.

These views, whatever may be thought of their consistency in other respects, are consistent in this, that they reduce the matter to a question of construction of the Act, especially of the 18th section.

As a question of construction, it seems little less difficult to adopt the opinion that there is beyond all doubt a clear and constructive prohibition, as the other opinion that there is an express prohibition.

The established doctrine is, that to annul such a transaction there must be no doubt whatever as to the construction and effect of the statute.

There seems danger in countenancing the notion of a constructive policy in such a case as the present. This is illustrated by what is said by Mr. Justice *Hargrave*, so far as it can be legitimately referred to. The circumstances of climate and soil and produce in the colony of *New South Wales* are essentially different from those of *Queensland*, where the policy of prohibition of such transactions was established by express enactment.

As to the policy of the Act in question in this case, and the construction of the 18th section, the *primâ facie* view of the policy which restricts the quantity of land that may be purchased by free selection, seems to be the reasonable purpose of securing residence and improvement of the land.

If that be a just view of the policy it is not easy to see how it is violated by a transaction the essence of which is to bind the Respondent as purchaser to reside and improve. But this is only conjecture. It is dangerous in the construction of a statute to proceed upon conjecture.

The view of policy taken by the majority of Judges is con-

jectural also. It seems a conjecture not so well founded as the other.

It is not an accurate view to treat the Appellant as the purchaser. The purchase is a transaction between the Respondent and the Government. The right of the Appellant is not that of purchaser, but of *cestui que trust.* In the case often referred to in the Law of resulting Trusts, where a man purchases land with the money of another, although there is no written evidence of the trust, a trust results to the owner of the money by operation of law. He is in equity, but only in equity, the owner of the land, and has a right to compel a conveyance to himself, or to such person as he may direct. He is not the purchaser, but a *cestui que trust,* and the whole legal right and legal rightful ownership is in the purchaser.

Although we think this case was rightly decided by the Court of the first instance, the form of the decree does not seem to be quite right.

There should be a declaration that the legal title of the Respondent as purchaser is held by him as trustee for the Appellant, and a direction that the Respondent do proceed to complete the purchase according to his contract with the Government, and to do all necessary acts for that purpose, and when complete to execute a proper conveyance to the Appellant, who is to pay the costs of such conveyance, with liberty to apply to the primary Judge for any directions necessary to carry this decree into effect. The Respondent is to pay the costs of the appeal to the Colonial Court, and costs of this appeal.

Agents for the Appellants: Messrs. *Burton, Yeates, & Hart.*

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Dec. 8.

THE CRÉDIT FONCIER OF ENGLAND, LIMITED . . . . . } APPELLANT;

AND

ELIE AMY AND OTHERS . . . . . RESPONDENTS.

WALKER BAILY . . . . . APPELLANT;

AND

ELIE AMY AND OTHERS . . . . . RESPONDENTS.

RE JERSEY MERCANTILE UNION BANK.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Petition for Special Leave to Appeal—Doléance—"Loi sur les Arrangements entre Débiteurs et leurs Créanciers" (1867)*—Jurisdiction of Royal Court of Jersey.*

Appeal dismissed.—A bank, carried on by an unlimited and unincorporated partnership in *Jersey*, stopped payment, and, after certain proceedings in voluntary liquidation, the *Juge Commissaire*, to whom the Royal Court referred the ascertainment of claims, &c., under the *Jersey Act* of 1867, reported that the *C. F.* was a creditor (if at all) to the amount of £53,606, and, after a further reference by the same Court relating to another creditor's claim, reported that the requisite amount of assents had been obtained, and thereupon the Royal Court registered and confirmed a composition between the partnership and its creditors.

The *C. F.* petitioned for special leave to appeal, first, against the order of the Royal Court referring the matter to the *Juge Commissaire*; secondly, against the further reference by the same Court; and, thirdly, against the order confirming and registering the composition; alleging that they were entitled to claim £55,160, and that the claim of *W. B.* (who also petitioned), having been admitted at £3800, was not mentioned in the schedule, and that by reason of this and another error of computation the requisite assents had not been obtained.

Their Lordships granted leave to appeal against the order confirming and registering the composition, limited to two questions; first, as to the claim for £3800; secondly, as to the alleged error of computation. The foundation of the jurisdiction of the Royal Court to register and confirm would be wanting, unless the composition were shewn to have received the requisite assents.

The 15th and 16th articles of the Act of 1867 must be read together. The decisions of the Royal Court are only final in reference to such a composition as it is entitled to register.

Their Lordships refused leave to proceed by a *doléance*, considering that by an ordinary appeal the petitioners could obtain relief.

THESE were petitions by the *Crédit Foncier* and Mr. *W. Baily* for special leave to appeal to Her Majesty in Council from the

* *Present*:—LORD COLERIDGE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

hereinafter mentioned Acts or Orders of the Royal Court of *Jersey*, dated respectively the 13th of October, 1873, the 14th of May, 1874, and the 8th of August, 1874; or that the merits of the case might be inquired into on the hearing of the Petitioners by way of *doléance*, and the said Acts or Orders reversed or varied.

On the 1st of February, 1873, the *Jersey Mercantile Union Bank*, an unlimited and unincorporated partnership, stopped payment, the *Crédit Foncier* and Mr. *W. Baily*, above mentioned, being at that date creditors of the bank.

On the 11th of February, 1873, the partnership was, at a general meeting of shareholders, declared to be dissolved, and five persons were appointed to act as liquidators for the winding-up of its affairs.

After certain proceedings had by the liquidators, which proved abortive, the executors and trustees of one *Eckford*, a creditor, made a motion in the Royal Court of *Jersey*, declaratory of *désastre*, against the shareholders. Thereafter the liquidators and eighty-two out of the ninety-seven shareholders and four creditors declared to the Court that they intended to convene a meeting of their creditors before the "*Juge Commissaire*" in confirmity with the prescriptions of the law of 1867, entitled, "*Loi sur les Arrangements entre Débiteurs et leurs Créanciers;*" and the Petitioners above named pleaded objections thereto. On the 13th of October, 1873, the Court referred to the Judge of the Small Debts Court, who acts in *Jersey* as the *Juge Commissaire*, to inquire into the whole matter, to take the examinations, and to ascertain what the claims of creditors were. Leave to appeal was given "*à fin de cause.*" The Petitioners appeared under protest in writing as creditors before the *Juge Commissaire*, who reduced the claim of the *Crédit Foncier* from £55,160 to £53,606, subject to a reference to the Court as to its validity, and admitted the claim of Mr. *W. Baily* at £3800 without interest. The claim of the said *Eckford* was reduced from £40,000 to £21,160.

On the 27th of April, 1874, the *Juge Commissaire* reported that the shareholders had engaged to subscribe a sum of more than £80,000, which they offered in full payment, and that the requisite majority of assents by the creditors had not been obtained, and

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that the agreement could not be confirmed unless the Court was of opinion that the claim of the *Crédit Foncier* was invalid.

On the 14th of May, 1874, the Court, without notice to the Petitioners, referred the claim of the said *Eckford* back to the *Juge Commissaire* on certain terms as to private arbitration, whereby eventually the claim of *Eckford* was fixed at £25,148, and his executor and trustees thereupon assented to the above-mentioned agreement. On the 25th of July, 1874, the *Juge Commissaire* made an amended report, stating that the requisite amount of assents had been obtained; but in the schedule thereto the Petitioner *Baily's* name was entirely omitted, and was unnoticed in the report. It also appeared that a debt of the amount of £1002 15*s.* 9*d.* had been proved twice over and scheduled accordingly, once by *E. Mourant*, representing the creditors, and again by *P. P. Guiton*, representing sureties for the debt, both amounts being included in the total; and that in several instances shareholders had made their propositions for composition by procuration, and not in person, contrary to Art. 13 of the law. On the 8th of August, 1874, the Court ordered the confirmation and registration, not of the agreement submitted to the Court, but of such agreement altered by the elimination of an important clause. It rejected the plea of the Petitioner *Baily* on the ground that the report of the *Juge Commissaire* was conclusive.

Mr. *Field*, Q.C. (Mr. *Westlake*, Q.C., and Mr. *Latham* with him), for the Petitioner, the *Crédit Foncier*, submitted that the act of the Royal Court of the 13th of October, 1873, referring the matter to the *Juge Commissaire*, that the whole of the proceedings before the *Juge Commissaire*, that the act of the Royal Court of the 14th of May, 1874, referring the claim of the executors and trustees of the will of the late Dr. *Eckford* to private arbitration, and that the final act of the Royal Court of the 8th of August, 1874, were all irregular and illegal, and that, under the circumstances, the *Crédit Foncier* was entitled to an appeal "*par doléance*" to Her Majesty for a remedy against the wrongs it had thereby sustained. He submitted that the order of the 14th of May, 1874, was beyond the power of the Court, which had no jurisdiction to reopen the finding as to *Eckford's* claim. As to the Act of the 8th of

August, 1874, he submitted that it ought to be reversed, (1) because by the agreement ordered to be registered, not only the shareholders, parties thereto, would be released from liability, but also the bank itself, which had no corporate capacity, so that fifteen present shareholders who had not appeared in the matter, and all the past shareholders, would share the benefit of the release; (2) the rules of procedure had been violated by the *Juge Commissaire;* (3) the account made out by the *Juge Commissaire* was incorrect, and the requisite majority of assents had never been actually obtained.

Mr. *Cohen,* Q.C. (Mr. *Wood Hill* with him), for the Petitioner *Baily,* submitted that his claim having been duly proved, and having been subsequently omitted without notice to him and without a hearing, he was entitled to appeal.

The judgment of their Lordships was delivered by

LORD COLERIDGE:—

In this case two petitions have been presented for leave to appeal from the judgment of the Royal Court of *Jersey* confirming and registering a composition of the creditors of a large copartnership, amounting in all to ninety-seven persons, who were carrying on a bank as an unlimited and unincorporated partnership in *Jersey;* and the two petitions have been presented to their Lordships, one from the *Crédit Foncier of England,* and the other from a gentleman of the name of Mr. *Walker Baily.*

In both the cases their Lordships think the petition for leave to appeal should be granted, but should be granted under the conditions and subject to the observations that their Lordships are about to make.

The partnership stopped payment in 1873, and a certain number of persons met together, and endeavoured to arrive at an arrangement between the creditors of the copartnership and the copartnership itself. Liquidators were appointed, and various steps were taken; and finally the matter, under the *Jersey* law of 1867, was referred to the Judge of the Small Debts Court, who acts there as what is called the *Juge Commissaire,* to inquire into the whole matter, to take the examinations, and to ascertain what the claims

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against the copartnership really were, and finally to report to the Court Royal, under the authority of the *Jersey* law, as to whether the composition which had been entered into, or was endeavoured to be entered into, should be confirmed and registered by that Court. The Royal Court acts under this *Jersey* law of 1867, and its powers are of course limited by the provisions of that Act. The earlier portions of the Act which has been before us deal with the procedure before the *Juge Commissaire*, and the procedure leading up to the appeals from the *Juge Commissaire;* and then the subsequent articles, 13, 14, 15, and 16, deal with the procedure which is to be carried into effect by the Royal Court after the *Juge Commissaire* has made his report. It is chiefly if not exclusively upon the supposed miscarriage by the Royal Court that this petition has been presented to their Lordships.

Now the 13th, 14th, 15th, and 16th articles are to this effect: That when the creditors appeal before the *Juge Commissaire* the debtor must make his propositions for composition in person, and that the *Juge Commissaire* is to approve those propositions in the presence of the creditors. The 15th article states that the composition must be signed by the requisite number of creditors, in conformity with the second article of the law; the second article of the law orders that there must be a consent of a number of creditors forming the majority in number, and representing at least three-fourths of the whole of the debts proved before the *Juge Commissaire* mentioned in the 5th article, and that when the composition has been signed by the requisite number of creditors according to the second article, then it is to be submitted for confirmation and registration by the Royal Court. The 16th article states that the Royal Court is to allow of no opposition to the confirmation and the registration of the composition, unless it has been previously made before the *Juge Commissaire;* and it goes on to say that the Royal Court is to determine summarily, and that its decisions are to be without appeal.

Now there are set out in this case the various proceedings of the *Juge Commissaire,* by way of recital to his final report made to the Royal Court. The final report is made, no doubt, upon the 25th of July, 1874; but the proceedings had been going on before him, beginning on the 13th of October, 1873; therefore, from the

13th of October, 1873, to the 25th of July, 1874, this matter was going on before the *Juge Commissaire*. Amongst other persons who appeared before him, the *Crédit Foncier* appeared. The *Crédit Foncier* claim against the copartnership in *Jersey* for a debt which they state to amount to £55,160. Before they appeared they put in a protest before the *Juge Commissaire*, and objected to his proceeding. But they took no steps to prevent his proceeding. They made no appeal to this Court, or to any other Court, to restrain his proceeding; and they apparently appeared before him, and entered into calculations, and were heard before him as to the nature of their claim, as to the subjects of the claim, and as to the amount of the claim; and finally the *Juge Commissaire* ascertained the claim at £53,606. He admitted the claim as valid at that amount, but he referred certain questions which had been litigated before him, as to the right of the *Crédit Foncier* to rank as a creditor at all, to the decision of the Royal Court. They were, as appears, very large claims. And there was another very large claimant, of the name of *Eckford*. He claimed something like £40,000. Those two large claimants were sufficient, with the other persons who did not assent, to prevent the assent of the requisite number and value of creditors from being obtained so as to make the composition binding under the provisions of the law of 1867. And so in the recital in which he gives the various notes of his proceedings from day to day he reports to the Royal Court; and upon the 27th of April he reports expressly that the *Crédit Foncier* having not at that time assented, and that Mr. *Eckford* having not at that time assented, if the Court should decide that the *Crédit Foncier* had a right to be considered as a claimant to the extent of £53,606, at which he had ascertained their claim, no composition could be arrived at, because those two were alone sufficient to prevent the composition having the requisite legal incidents attached to it. Subsequently to that, there appears to have been a reference sanctioned by him to two Queen's counsel in *England*, of the matter in dispute between Mr. *Eckford* and the bank; and those two gentlemen, Mr. *De Gex* and Mr. *Fry*, having ascertained the debt at £25,000, Mr. *Eckford* no longer objected. It is mentioned in the 17th page

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of the petition before us, that upon that award Mr. *Eckford* withdrew his opposition, and became a consenting party to the composition. That left the *Crédit Foncier* still standing out; and but for a mistake hereafter to be mentioned, the requisite number and the requisite value of the creditors would have been arrived at for the purpose of validating the composition, and the composition would have been effective according to the law of 1867. To that effect the *Juge Commissaire* reports; and he reports that the requisite number of persons having agreed to the composition he submits it to the Royal Court,—submitting, however, to them the question, the very important question, not of the amount of the claim of the *Crédit Foncier*, but whether the *Crédit Foncier*, under the circumstances set out before him, which he details in his report, had a right to claim at all against this copartnership. The Royal Court, upon that state of things, confirmed and registered the deed, referring, in the judgment which they gave, the question of the amount for which the *Crédit Foncier* was to stand against the copartnership to the ascertainment of their registrar. The true view of the matter is what was presented by their Lordships in the course of the argument of Mr. *Field*, that early in the transactions, so far back as November, 1873, the *Juge Commissaire* had ascertained the amount of the debt due to the *Crédit Foncier* at £53,600 odd; he has ascertained that amount finally and without appeal. At least, if there was to be an appeal against his so ascertaining it, it must have been prosecuted then and there, and at once; that all that he meant to refer and all that he ever did refer to the Royal Court was the legal right of the *Crédit Foncier* to claim, and that that he referred to them on the 10th of November, 1873. Matters went on; and the final report, and the judgment of the Court upon that final report, was given in the following July. But from November, 1873, to July, 1874, the present petitioners have done nothing. They allowed the matter to stand upon the order of the *Juge Commissaire;* they have taken no steps to disturb his decision, as far as amount went; and the matter as to whether they had a right to claim for anything at all was by the *Juge Commissaire* referred to the Royal Court itself.

Now they claim, the registration and confirmation having taken place, to upset it upon various grounds. First of all, they say that the original order of the 13th of October, 1873, of the Superior Court was an order which they had no right to make. That is the order referring it to the *Juge Commissaire*, and putting the whole matter in train for investigation before him. But the Royal Court pronounced that decision on the 13th of October overruling that plea, and sent them with other creditors, that their case might be examined into before the *Juge Commissaire*. At the conclusion of that sentence they expressly reserved to the Appellants the right to appeal *à fin de cause*. Their Lordships are of opinion that, whatever may be the effect of that reservation, the Petitioners before them are entitled to the benefit of it, without any order made by their Lordships; but if they are entitled to nothing under that order their Lordships are not disposed to help them, because they have stood by from the 13th of October, 1873, to the present time; they have allowed all the expenses and trouble of this investigation and composition to be entered into; they have done nothing to dispute it, they have taken their chance of being pleased with it, and they now seek for leave to petition against that which, if they were dissatisfied with it on the ground of jurisdiction, they should have petitioned against long ago. Therefore, if they have the right reserved to them by the Court, of course they can exercise it; if they have not such a right, as far as that part of the petition goes, their Lordships are not disposed to give them what they ask.

Then they claim to examine the final judgment of the Court; and they claim to examine it upon various grounds. They say, first of all, that they ought to have a right now to increase their claim from £53,600 to £55,160. Their Lordships are not disposed to give them any such leave. It was ascertained, so far back as November, 1873, by the *Juge Commissaire*, that they had a right if at all, if the legal objections were not to be made to the whole claim, at the most for £53,000 only. If they meant to dispute that, they should have disputed it then; and they must be taken as against themselves to be precluded by that judgment; and for £53,000, if at all, they must be content to prove and claim.

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Well then, they say that they are entitled to have this matter inquired into, because they say that the Court has acted without jurisdiction. In truth, that is what the objection comes to. They say that the jurisdiction of the Court to confirm and register the composition must be limited to confirming and registering a composition which by law could be entered into, and that the Court cannot give itself jurisdiction if the law does not give it. They say that here they are in a position to prove that a sum of £3800 has, by some mischance, been omitted from the schedule of debts; that is the sum represented by Mr. *Walker Baily's* debt; and that the debt of another gentleman, of the name of *Mourant*, has been counted twice over. His debt is a thousand and odd pounds, and that would bring the error up to an error of near £5000. They say that there has been an error to the extent of something near £5000 in the casting up of the accounts, and that debts to that amount have not been taken into the account in estimating the three-fourths in value and number which the second article of the law of 1867 requires. Their Lordships think that this is a very serious matter, and that upon that point the Petitioners should have leave to appeal; that it would be right that this question, if it be a mistake, and still more if anything of this kind should be done intentionally, is one which it is very fit should be inquired into by appeal.

The difficulty that presented itself to their Lordships was that portion of the 16th article of the law of 1867 which states that the Royal Court shall have the confirmation and registering of compositions, and that in such matters the Court shall determine summarily, and that its decisions shall be final. But without saying, and without intending to intimate, that the words of that 16th article do or could take away from Her Majesty in Council the right to re-examine on appeal cases where it was clear that a miscarriage of justice had arisen, or the Court had clearly exceeded its powers, or had done that which was manifestly wrong, it is enough to say in this case that their Lordships are of opinion that the law must be construed as a whole, that the 15th and 16th articles must be taken together; and that as the 15th article states that a composition, to be binding, must be signed by a particular

portion of creditors, and as it is only such a composition that the Royal Court is entitled to register, and it is only in reference to such a composition that the decisions of the Court are to be final, the Court is satisfied that the very foundation of the jurisdiction of the *Jersey* Court would be wanting if the errors suggested as having taken place can be proved to have taken place in fact. And without at all intending to infringe on the cases which have been determined upon other states of circumstances and under other Acts of Parliament or Acts of Colonial and Foreign Legislatures, it is enough to say that here it seems to their Lordships that the foundation of the jurisdiction of the *Jersey* Court would be wanting if the facts which are stated to their Lordships should be ultimately proved at the hearing of the appeal. Upon that ground it is plain that this is a matter to be examined into by the Court of Appeal, and that upon that ground the leave to appeal ought to be given.

Their Lordships limit the leave to appeal to those two points:—the point as to Mr. *Walker Baily's* debt, and the point of the mistake as to *Mourant's* debt being stated twice over. And upon those grounds only they think that it would be fit that the decision of the Royal Court of *Jersey* of the 8th of August, 1874, should be re-considered and heard upon appeal.

Their Lordships have said nothing on the ground of *doléance.* It is far better, when there is a fair ground of raising all that their Lordships think fit to be raised,—apart from all personal questions,—so to raise it. A *doléance,* in Mr. *de Geyt's* book on the Laws of *Jersey,* is very properly described as an odious proceeding. It is a personal charge against a judicial officer,—a personal charge either of misconduct or of negligence; and if all that could be gained to a Petitioner by a *doléance* is gained to him by the ordinary appeal in the manner in which their Lordships think it open to this Petitioner, their Lordships think it right to confine him to that ordinary appeal, and to dismiss the matter as regards the *doléance,* and as regards the personal negligence of the officer whose character would be impeached by granting leave to bring such a *doléance* before this Committee.

With regard to the matter on which we heard Mr. *Cohen,* the

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judgment already pronounced sufficiently shews what the opinion of their Lordships is. It is right that Mr. *Walker Baily* should have his leave to appeal upon the grounds stated,—that his £3800 has been omitted from the schedule of debts, and that he has therefore had no opportunity of either assenting or dissenting; and that the absence of his £3800 reduces the number of assents below the statutory requisite; of course being the person whose £3800 is omitted, he has a right to inquire into the same decree of the Royal Court on those same grounds.

Their Lordships will therefore humbly recommend Her Majesty to grant leave to appeal from the judgment of the Royal Court of *Jersey* of the 8th of August, 1874, to the petitioners, but this appeal is to be restricted to two questions; viz., 1st, whether the sum of £3800, being the amount of Mr. *Walker Baily's* debt, has been omitted from the schedule of debts; and, 2ndly, whether the debt of Mr. *Mourant* has been counted twice over. These appeals will be heard together with the appeals now pending between the same parties before Her Majesty; but £150 is to be lodged by each of the petitioners within one fortnight as security for the further costs occasioned by these proceedings.

Attorney for the *Crédit Foncier:* Mr. *F. Heritage.*
Attorneys for *W. Baily:* Messrs. *Dawes & Sons.*

DAME HENRIETTE BROWN . . . . APPELLANT;

AND

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE NOTRE DAME DE MONTREAL . . . . . RESPONDENTS.

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June 27, 30; *July* 1, 2, 4, 7, 8; *Nov.* 21.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC IN THE DOMINION OF CANADA (APPEAL SIDE.)

Status of the Roman Catholic Church in Lower Canada—Ecclesiastical Burial —Practice—Mandamus—Recusatio judicis.

G., a lay Roman Catholic parishioner of *Montreal*, on the 18th of November, 1869, died, a member of the "*Institut Canadien*," a literary society which had incurred ecclesiastical censures. In his lifetime a pastoral letter of the Bishop of *Montreal* had forbidden such membership on pain of being deprived of the Sacrament "*même à l'article de la mort.*" During illness the priest who administered unction had refused to administer Holy Communion; and at his death six years thereafter the *curé* of *Montreal*, under the direction of the bishop, refused "*la sépulture ecclésiastique*," after request duly made in that behalf; that is to say, the said *curé* refused burial in the larger part of the local cemetery, in which Roman Catholics are usually buried with the rites of the church, and in which the graves are consecrated; but he offered burial without rites in the smaller or reserved part, in which the graves are never consecrated, and in which are buried unbaptized infants, criminals, and those who have died "*sans les secours ou les sacrements de l'Église.*" This proposal was rejected, though *G.*'s widow offered to accept burial in the larger part without religious services.

On a petition by *G.*'s widow for a mandamus to the Respondents upon receipt of the customary fees to bury *G.*'s body in the said cemetery conformably to usage and law, and to enter such burial in the civil register, a writ of summons was issued by the Superior Court which, in substance, called upon the Respondents to shew cause why a writ of mandamus should not be issued. Thereupon the Respondents petitioned, *inter alia*, that the writ being of summons and not of mandamus, might be annulled for irregularity; traversed the Plaintiff's petition and pleaded, first, the irregularity above mentioned; secondly, that they had not refused, but had offered such burial as *G.* was entitled to; thirdly, that they were legal proprietors of the cemetery, free from civil interference or control as respects the service of religion and the exercise of its ceremonies, and were legally entitled to point out the

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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precise spot in the cemetery where each burial was to be made; that they were also civil officers within certain limits, and civilly responsible in that capacity only; that they had offered such burial, and refused nothing but ecclesiastical burial, on the ground that *G.* had been for ten years previously to his death "notoriously and publicly subject to canonical penalties," resulting from the before-mentioned membership, and at the direction of the proper ecclesiastical authorities. They further, in special replication to the Plaintiff's answer, denied that the civil Courts could examine the grounds of refusing ecclesiastial burial, which they nevertheless specified, averring that in consequence of the premises *G.* must be considered "*un pécheur public*," and as such deprived of ecclesiastical burial by the Roman Catholic ritual.

Held, firstly, that the writ of summons was in proper form according to the Code of Procedure in *Canada*:

Secondly, that *G.* never having been excommunicated *nominatim*, and never having been adjudged or proved to be "*un pécheur public*" within the meaning of the *Quebec* ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the *Quebec* ritual, or any law binding upon Roman Catholics in *Canada*, justify the denial of ecclesiastical sepulture to his remains.

Thirdly, that the Respondents, who were sued in their corporate capacity as holders of land and administrators of the cemetery, were bound to give to *G.'s* remains burial in the larger part of the cemetery, on payment of the accustomed fees; and that a peremptory writ of mandamus should be issued accordingly.

Quære, whether their Lordships would have power in a suit properly framed for that purpose to order the performance of the usual religious rites.

Although the Roman Catholic Church in *Canada* may, on the conquest in 1762, have ceased to be an established church in the full sense of the term, it nevertheless continued to be a church recognised by the state, retaining its endowments and continuing to have certain rights (*e.g.*, the perception of *dîmes* from its members) enforceable at law.

Although the Civil Courts in *Canada* may not be competent to entertain a suit in the nature of the "*appel comme d'abus*," yet the jurisprudence and precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in *Canada*.

Long v. *The Bishop of Capetown* (1) approved.

Even if the Roman Catholic Church in *Canada* were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws and rules of the tribunal or authority which has inflicted the alleged injury, and to ascertain whether the act complained of was in accordance with the law and rules and discipline of the Roman Catholic Church which obtain in *Lower Canada*, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by competent authority.

(1) 1 Moore P. C. (N.S.) 461. 9 Jur. N.S. 805

Semble: The Ecclesiastical Law which now governs Roman Catholics in *Lower Canada* must be taken to be identical with that which governed the French province of *Quebec;* except so far as modifications are proved to have been introduced by valid consensual contract.

Their Lordships approved the refusal by the Court of Queen's Bench to receive a petition of recusation against the Judges, alleging that they acknowledged the Roman authority, and were thereby disqualified to try whether the civil power can entertain an "*appel comme d'abus.*"

THE suit in which this appeal arose related to the right of *Joseph Guibord,* a printer of *Montreal,* who died on the 18th of November, 1869, to burial in the cemetery of *La Côté des Neiges,* of which the Respondents, a Roman Catholic ecclesiastical corporation, are the proprietors, and have the management subject to the superior ecclesiastical authority.

The circumstances anterior to the suit, and out of which the same arose, are fully detailed in the judgment of their Lordships.

On the 20th of November, 1869, M. *Doutre,* at the request of the widow of the said *Guibord,* Dame *Henriette Brown,* applied to M. *Rousselot,* who was the *curé* of the parish of *Montreal,* and to the clerk of the *fabrique,* to bury *Guibord* in the cemetery, tendering them the usual fees. M. *Rousselot* knowing that *Guibord* had been a member of the *Canadian Institute,* a literary society which had incurred ecclesiastical censures, and having previously heard of his death, had written to M. *Truteau,* the grand vicar, who had been appointed the administrator of the province in the absence of the bishop, asking his direction; and M. *Truteau,* by his answer, directed him to refuse ecclesiastical burial to *Guibord's* remains. M. *Rousselot* thereupon refused to bury the body of *Guibord,* except in the part of the burial-ground in which persons not members of the Roman Catholic church and unbaptized infants were buried, and he also refused to allow the burial to be accompanied by any funeral rites; the officers of the *fabrique* concurred in this refusal. M. *Doutre,* on behalf of Madame *Guibord,* agreed to accept burial of the deceased without religious rites, so long as it was within the part of the burial-ground in which members of the Roman Catholic church were usually buried, but this was refused by the *curé* and the *fabrique.*

A formal notarial protest was then delivered to the clerk to the *fabrique,* demanding burial for the body, which was refused.

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On the following Sunday afternoon, the 21st of November, the body was taken to the cemetery; and the person in charge having received previous instructions on the subject, refused to receive it except for burial in the part divided off from the main body of the burying-ground as hereinbefore mentioned, and the body was then placed temporarily in the Protestant cemetery, where it remained at the date of this appeal.

The suit was commenced by a petition which Dame *Henriette Brown* presented to the Superior Court for the district of *Montreal* on the 24th of November, 1869, praying that a writ of mandamus might issue addressed to the Respondents, and that the Respondents might be ordered, on payment by the Petitioner of the customary fees, to bury the body of the late *Joseph Guibord*, conformably to custom and law, in the Roman Catholic cemetery of *La Côté des Neiges* under their control and management, within eight days from the judgment to be pronounced; and further, that the Respondents might be ordered to enter such burial in the civil register also conformably to custom and law; the whole with costs against the Respondents. The allegations of the petition were to the effect that *Joseph Guibord*, the Petitioner's husband, died at *Montreal* on the 18th of November, 1869, in possession of the civil status of a Roman Catholic, and belonging to the Catholic diocese, and to the parish of *Montreal;* that the Respondents are the managers and custodians of the only Roman Catholic cemetery devoted to the burial of persons of that religion dying in the city and parish of *Montreal*, and are charged by law with the duty of burying such persons, and of keeping the civil registers, and especially the register of burials for that parish; that the Respondents had been formally required on the 20th of November, with due tender of fees, to bury the said body on the next day in the cemetery common to all the Catholics of the said city and parish, or to receive the said body on the next day in the same cemetery for the purpose of burial, and had formally refused to comply with such requisition; that the Respondents, on the 21st of November, the body being then within the bounds of the said Catholic cemetery, had again been required with due tender of fees to bury it in such cemetery, and had refused so to do; and that in consequence of such refusal the body had been deposited in the cemetery of *Mont Royal*, which was not devoted to

Catholic burials, there to await the decision of the Court on that petition.

The petition was supported by affidavits sworn by *Alphonse Doutre* and *Alfred Boisseau*, and on the 24th of November a writ issued by the order of Mr. Justice *Mondelet*, in the following form:—

"No. 222.

"*Cour Supérieure pour le Bas Canada, District de Montréal.*

"*Victoria, par la grâce de Dieu, Reine du Royaume Uni de la Grande Bretagne et d'Irlande, Défenseur de la Foi:*

"*À chacun des huissiers de la dite Cour nommés pour le district de Montréal:*

"*Nous vous ordonnons d'assigner dans les limites du district de Montréal les curé et marguilliers de l'œuvre et fabrique de la paroisse de Montréal, dans le district de Montréal, afin qu'ils comparaissent pardevant un des Honorables Juges de notre dit Cour Supérieure pour le Bas Canada, dans la cité de Montréal, dans le district de Montréal, Mardi le trentième jour de Novembre courant, pour répondre à la demande qui sera faite contre eux par Dame Henriette Brown, de la cité de Montréal, veuve de feu Joseph Guibord ou Guibort* alias *Joseph Guibord dit Archambault, en son vivant imprimeur, de la cité et du district de Montréal, pour les causes mentionnées dans la requête libellée ci-annexée, et vous nous rapporterez alors cette ordre.*

"*En foi de quoi, nous avons fait apposer aux présentes le sceau de notre dit Cour à Montréal, ce vingt-quatrième jour de Novembre en l'année de notre Seigneur mil huit cent soixante-et-neuf, dans la trente-troisième année de notre règne.*

In formâ pauperis. (L.S.)

(Signed) "*Hubert, Papineau, & Honey,*
"*Protonotaire de la dite Cour.*"

(On the back.) "*Le présent bref a été émané par l'ordre de l'Honorable Charles Mondelet, un des Juges de la Cour Supérieure pour le Bas Canada a Montréal, ce vingt-quatrième jour de Novembre mil huit cent soixante-et-neuf.*

(Signed) "*Hubert, Papineau, & Honey,*
"P. C. S."

On the 30th of November the Respondents appeared to the

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writ, and the Plaintiff filed the certificates of the Roman Catholic baptism of *Joseph Guibord* and of her Roman Catholic marriage with him, and an act of the notarial requisition made to the Respondents on the 20th of November.

On the 10th of December the Respondents filed a petition, dated the 9th, praying that the writ might be annulled for irregularity, as containing no statement either of the Plaintiff's or of the Respondents' capacity, or of any legal duty which the Respondents had refused or omitted to perform, nor any judicial order for the Respondents to perform the legal act or duty omitted or neglected by them, and being in fact a simple writ of summons and not of mandamus.

At the same time with their petition the Respondents filed a general traverse of the writ and Plaintiff's petition, and three pleas, in each of which they claimed that the pretended writ of mandamus should be dismissed with costs.

The first plea went on the ground of the irregularity of the writ, in which the same defects were pointed out as by the Respondents' petition.

The second plea, meeting simply the prayer of the Plaintiff's petition, averred that it is customary in the Catholic cemeteries of *Lower Canada* to bury in the mornings, and at hours agreed on with the curate of the parish, but that on the 21st of November the body of *Joseph Guibord* had been brought to the cemetery during the afternoon divine service, and without previous notice to the Respondents, who therefore were not and were not bound to be present there, or represented there by any person authorized legally to authenticate the death or to bury the body; but for this the Respondents would have pointed out the place in the cemetery where the burial should be made, as they had a right to do, and would have given to the remains such burial as they were entitled to.

The third plea averred that the service (*culte*) of the Roman Catholic religion in *Canada* is free, and the exercise of its religious ceremonies of whatever nature is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognises the Respondents as proprietors of the Roman Catholic parish church of *Montreal* and

of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the Respondents, and of the superior Roman Catholic ecclesiastical authority; that the Respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that besides their above-mentioned capacity the Respondents are also civil officers within certain limits, having to fulfil certain civil duties defined by law, and are legally responsible in that capacity and sphere only; that the Respondents, in their double capacity thus existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of *Montreal,* and are responsible to the religious and civil authorities respectively for the religious and civil portions of such functions; that the Respondents for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief who are buried with Roman Catholic religious ceremonies and another part for the burial of those who are deprived of ecclesiastical burial; that *Joseph Guibord* was a member of a literary society at *Montreal,* called the *Canadian Institute*, and as such was at the time of his death, and had been for about ten years previously, notoriously and publicly subject to canonical penalties resulting from such membership and involving deprivation of ecclesiastical burial; that immediately after the death of *Joseph Guibord* the Rev. *Victor Rousselot,* Roman Catholic priest, and curate of the parish of *Montreal,* submitted the question of his religious burial to the Rev. *Alexis Frédéric Truteau,* Vicar-General of the Roman Catholic diocese of *Montreal* and administrator of the diocese, with supreme ecclesiastical authority therein, in the absence of the Bishop, by virtue of the rescript of the Pope, dated the 4th of October, 1868; and that the said Administrator replied by a decree declaring that since *Joseph Guibord* was a member of the *Canadian Institute* at the time of his death, eccle-

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siastical burial could not be granted to him; that the Plaintiff, by her agents, having required M. *Rousselot* and the Respondents to give to the body both religious and civil burial in the cemetery in question, they repeatedly informed the said agents of such decree of the Administrator of the diocese, and that in consequence thereof ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the Plaintiff or her agents, and that, having regard to the above facts, the Plaintiff could not claim from the Respondents for the remains of her late husband more than civil burial, and that under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the Respondents had never refused. The same plea then repeated the averments of the second plea, and concluded by saying that the Respondents, as civil officers, had not neglected or refused to perform any duty imposed on them by the law, and in fact had refused nothing but ecclesiastical burial, for the refusal of which they were responsible only before the religious, and not before the civil authority.

On the 11th of December the Plaintiff made two motions, one that the Respondents' petition for the amendment of the writ might be rejected with costs, the other that the Respondents' first plea might be rejected and struck out with costs; alleging in each, among other reasons, that the objections made to the writ were in the nature of an exception to form (*exception à la forme*), and had not been brought forward within the time allowed for such an exception; or been accompanied by the deposit of a sum for costs. By Art. 107 of the *Code of Civil Procedure* the time to take an exception to form is four days from the return of the writ; but by Art. 111 the Court has power to order that the omission to take the exception in such time shall not foreclose the party from taking it. Mr. Justice *Mondelet* granted the first motion, but refused the second, on the ground that the Plaintiff ought to have met the plea by answer and not by motion; and the suit has since been proceeded with as a common action commenced by writ of summons. The Plaintiff filed her answer on the 16th of December, and thereby renewed her above-mentioned objections to the first

plea by an answer in law, or a demurrer thereto, and traversed the allegation in the second plea as to the custom of burying in the morning. To the third plea she made three answers. The first an answer in law, or demurrer; the second, a general traverse in fact; the third, a special answer both in law and in fact.

The first answer or demurrer to the third plea stated that it appeared from the allegations of the plea in question that the offer made by the Respondents to bury the body of the deceased contained and implied the refusal to bury it in the cemetery devoted to the burial of Roman Catholics, and conformably to the usages relating to such burials and to the law. But the substance of the answer was, that by the French law existing in *Canada* at the time of the cession to *Great Britain*, the judicial authority representing the Sovereign had jurisdiction to correct and prevent the abuses of religious authority in circumstances such as those which had given rise to this action; that the burial due to the remains of *Joseph Guibord* was a consequence of his civil *status* of Roman Catholic, and that as well since as before the cession there is no authority in the country independent of the State and the Civil Courts in any matter affecting the rights of the subject; that the plea did not sufficiently state the canonical penalties alleged by it, and particularly did not shew whether they had been pronounced against *Joseph Guibord* by name, a condition without which the Plaintiff averred that they could not have the effect attributed to them by the Respondents; and that since the *Canadian Institute* was incorporated by a public Act of Parliament of the late province of *Canada*, no authority but that of Parliament could restrict the liberties and franchises granted to its members by that Act, and the plea, as tending to attribute to the bishop the right of restricting them, constituted an attempt against the authority of the Sovereign. The third or special answer to the third plea repeated the substance of the demurrer to the same plea, and then went into long allegations and arguments concerning the *Canadian Institute*, and what had happened in connection therewith; in the course of which it was alleged that the only canonical penalty which can deprive a member of the Catholic Church of ecclesiastical burial is the major excommunication pronounced against him by name, and that the major

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excommunication is invalid unless it has been preceded by notices (nominations) in writing served on the person whom it is to affect; and as the result of such allegations and arguments it was denied that *Joseph Guibord* was subject at the time of his death to any canonical penalty. The Plaintiff also took issue on the Respondents' plea of the general issue.

On the 31st of December, 1869, the Respondents filed a general replication; and on the 3rd of January, 1870, they filed, with leave obtained, a special replication to the Plaintiff's third answer to their third plea. In this special replication the Respondents, after reiterating that the Civil Courts had no power to question the decision of the ecclesiastical authorities on ecclesiastical matters, and could not therefore inquire whether the Grand Vicar had good grounds for deciding that ecclesiastical burial should be refused to *Guibord;* cited the Decrees of the Council of *Trent* with regard to the Index, and the acts done by the *Institut Canadien;* and alleged that by reason thereof *Guibord* was at the time of his death considered as a public sinner, and subject as such to all the canonical pains imposed by the Roman Catholic ritual, entailing amongst other things the loss of ecclesiastical burial, and that therefore the Respondents were justified in refusing it.

The Petitioner on the 5th of January joined issue on the special replication.

The cause came on before Mr. Justice *Mondelet* on the 17th of March, 1870, on the Plaintiff's demurrers to the Respondents' first and third pleas, on the merits of the cause, on a motion by the Plaintiff that if judgment should be given in her favour it might be executed notwithstanding any appeal, and on two motions by the Respondents for the rejection of certain parts of the evidence to which they had objected at the examination of the witnesses.

On the 2nd of May, 1870, Mr. Justice *Mondelet* pronounced the judgment of the Superior Court refusing all the motions on both sides, allowing the demurrers to the Respondents' first and third pleas, and on the merits of the cause adjudging and ordering the plaintiff to present the body of *Joseph Guibord* at the cemetery with a requisition to the Respondents to give to it therein by the curate of the parish, or by such other priest as should be duly appointed for that purpose, the burial determined by custom and

law, and ordering the issue of a peremptory writ of mandamus commanding the Respondents on such requisition to give to the body the aforesaid burial, according to usage and law, and such as is given to the remains of any parishioner who, like him, dies in possession of his *status* of a Roman Catholic, and to enter the death of *Joseph Guibord* in the parochial register according to law. The judgment also condemned the Respondents in costs; but the writ of mandamus did not issue as ordered, an appeal to the Court of Review being immediately entered.

The judgment declared that it was rendered without regard either to the Plaintiff's special answer to the third plea or to the Respondents' special reply to that answer, which had displaced the question legitimately arising in the cause, and which the parties had acted erroneously in not setting down to be heard on the law; and the grounds of the judgment were stated to be that the Respondents were proved to have refused to give to the body the burial which by law and custom they were bound to give it in the Catholic cemetery of *La Côté des Neiges;* that such refusal was a violation of the civil and ecclesiastical laws and of the canons; that the decree of the administrator of the diocese was illegal; that the said administrator was mistaken in drawing the refusal of ecclesiastical burial as a conclusion from the bishop's refusal of absolution, even *in articulo mortis*, or that if the bishop intended such a consequence, he was himself guilty of an abuse of power, condemned both by civil and by ecclesiastical law; that the burial offered by the Respondents was inadmissible because it would amount to flinging out the body like dirt to the scavenger (*jeter à la voirie*), and that *Joseph Guibord* at the time of his death was in possession of his *status* of a Roman Catholic, and of a parishioner of the parish of *Montreal*, and of all the rights thereto attached by law.

On the 23rd of June, 1870, the cause was heard on appeal by the Court of Review, composed of Justices *Berthelot*, *Mackay*, and *Torrance*, who on the 10th of September gave judgment, reversing the judgment of the Superior Court, and quashing the writ of mandamus and dismissing the Plaintiff's petition with costs in favour of the Respondents, as well in the Superior Court as in the Court of Review. The reasons assigned were that the so-called

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writ of mandamus was insufficient; particularly in containing no command to perform anything; that the Respondents are not the keepers of the civil registers; that the demand of burial in the Plaintiff's petition was vague, and the order for burial contained in the judgment of the Superior Court was erroneous in not specifying what kind of burial was meant; that it was not in the power of the Respondents to perform ecclesiastical burial, and that they had offered mere burial before the Plaintiff presented her petition; and that the Superior Court had gone beyond the prayer of the petition in commanding the curate of the parish to perform the burial mentioned in its judgment.

Mr. Justice *Mackay*, said:

"The original writ is faulty. It ought to have contained a command, so that, if peremptory writ ordered, it might follow the language of the original.

"The Plaintiff's conclusions are faulty, vague, and in part unfounded and unwarranted. Two things are asked:—

"1°. Order to bury in the Roman Catholic cemetery *Joseph Guibord* conformably to the usages and the law.

"2°. To insert on the register of the *État Civil* the certificate of such burial conformably to the usages and the law.

"As to the first: Under such vague conclusion the point really meant to be tried is hidden. That the Defendants are bound to bury *Guibord* in the Roman Catholic cemetery according to the usages and the law is indisputable and not disputed. Peremptory mandamus to do this would nevertheless leave things just as unsettled between Plaintiff and Defendants as they were the day before the Plaintiff presented her *requête*.

"There are two kinds of burials and places accordingly in that cemetery, according to the usages and the law. We see at the end of the case that one kind and place would be of no interest to, and would not be acceptable by, the Plaintiff, who wants to get burial for her husband in another particular part of the cemetery, where only ecclesiastical burial is performed.

"Whatever may be meant by the vague conclusion referred to, no *peremptory* mandamus ought to be or need be; for ecclesiastical burial the Defendants cannot give, under the circumstances of this case, in the part of the cemetery where usually ecclesiastical inter-

ment is; and as to civil burial or mere interment, and place for this, in the cemetery, Defendants offered it before the *requête* for mandamus was presented.

"As to the second conclusion: It prays for a thing to be done by Defendants that they have not office or duty to do.

"The parish priests are the persons appointed to keep the registers of the *État Civil* of Roman Catholics. Suppose these Defendants, if they could get access to the registers, to give a certificate, purporting to be from them, it would have no weight at all.

"Proceeding to the judgment complained of, it is bad, for several reasons; for instance, for vagueness.

"The peremptory mandamus ordered by it would be useless, and could lead to nothing but trouble. 'The command' (says *Wilcock*) 'must be to perform some definite and specific act or acts; so that a certain and conclusive return may be made that the act is done.' There is no such command here.

"Execution of this peremptory mandamus might be by burying *Guibord* in the smaller part of the cemetery reserved for mere interment, or so-called *sépulture civile*, and returning 'buried *conformément aux usages et à la loi.*'

"This would be quite unsatisfactory to Plaintiff.

"Whether we take the judgment as ordering ecclesiastical or mere civil burial without ecclesiastical ceremony, it is bad, for like reasons as I have stated against the *requête's* conclusions for burial.

"The judgment is bad also for having granted the second or last conclusion of Plaintiff; that is, for Defendants to be ordered to insert in the registers of the *État Civil* the certificate of *Guibord's* burial. What I have said against the conclusion itself is equally applicable to this latter part of the judgment under review.

"In fact mandamus ought not to have been allowed to issue at all towards compelling Defendants to such a work, which (as I have said before) they have not office or duty to do.

"The judgment is bad too for dismissing Defendants' third exception, as it has done.

"It is bad also for ordering the *curé* to do things. Art. 17, *Code de Proc.* is violated by this.

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"The Plaintiff did not ask for the *curé* to be condemned. The judgment in this respect is *ultra petita;* and for this the *curé*, had he seen fit, might have proceeded independently by *tierce opposition* against it. (Arts. 16 and 510, *Code de Proc.*)

"Our judgment ought to reverse the one appealed from, and to hold that sufficient cause has been shewn by Defendants against any peremptory mandamus whatever, and that the original mandamus ought to be superseded, and the *requête libellée* dismissed."

From this judgment the Petitioner on the 19th of October, 1870, appealed to the Court of Queen's Bench, appeal side.

On the 2nd of December, 1870, she presented petitions of recusation against four of the Judges about to hear the cause, viz., *Duval*, C.J., *Caron*, *Drummond*, and *Monk*, JJ., as being disqualified for hearing it under s. 176 of the Canadian Code.

The petition suggested *inter alia* that the Judges acknowledged the authority of the Roman power. That the Roman power had decreed that it is necessary, under pain of anathema and excommunication, to believe that the civil power has not the right which is designated under the name of "*appel comme d'abus.*" That one of the questions in this case is whether the civil power has such a right. The petitions demanded of the Judges to declare whether these and the other statements contained in them were true. Upon the petitions being presented, *Duval*, C.J., *Caron*, *Badgley*, and *Monk*, JJ., being in Court, took time to consider what course to pursue, and on the 9th of December, the same Judges being present, refused to receive the petitions, or allow them to be entered in the register of the Court.

On the 7th of September, 1871, the Court (*Duval*, C.J., *Caron*, *Drummond*, *Badgley*, and *Monk*, JJ.) affirmed the judgment of the Court below upon grounds on which the Court differed.

Caron, J., held, 1. That the writ was void for not containing a command. 2. That it ought to have been addressed to the *curé* and not to the *fabrique*, the *curé* alone having the superintendence of burials, and the duty of making entries in the registers. 3. That the request made was for civil burial only, and that that was offered; and fourthly, that the condition that the burial should be in a particular part of the burial-ground was justifiable.

Duval, C.J., expressed himself of a similar opinion upon all

the points, but founded his judgment upon the defect in the form of the writ.

Drummond, J., held the writ right in form, and correctly addressed, and concurred solely on the ground that the power vested in the French Courts of *Canada* to adjudicate on certain cases affecting spiritual rights and duties had ceased on the country being ceded to a Protestant Sovereign, and that the Court had no jurisdiction to order ecclesiastical burial when refused by the ecclesiastical authorities.

Badgley, J., held the writ right in form, and that the Court had power to enforce the performance of the duties mentioned in the petition though affecting spiritual rights, and concurred solely on the ground that the writ and mandate required the performance of two duties, and not one only, and that to one of the duties, viz., making entries in the registers, the Respondents were not liable.

Monk, J., held that the writ and all the proceedings were regular and sufficient, and concurred only on the ground that, considering the offer made by the Respondents, the matters in dispute between the parties were matters over which the Court had no jurisdiction.

The Petitioner then obtained leave to appeal to the Queen in Council, and a petition of appeal was accordingly presented, dated the 12th day of June, 1872.

On the 24th day of March, 1873, Dame *Henriette Brown*, the Appellant, died, having by her will, dated the 22nd of October, 1870, devised to the *Institut Canadien* all her moveable and immoveable goods, corporeal and incorporeal rights, names, claims, rights of action, and other goods of whatever kind, appointing them her universal legatee.

The *Institut Canadien*, at a meeting held the 2nd of April, 1872, resolved to accept the said legacy under benefit of inventory, and to continue this appeal, and benefit of inventory was duly granted to them by an order of the Superior Court on the 15th of April, 1872.

The *Institut Canadien* accordingly presented a petition to Her Majesty in Council for leave to continue this appeal, and by an Order in Council, dated the 26th day of June, 1873, it was

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ordered that the said *Institut Canadien* should be allowed to continue this appeal without prejudice to any question which might be raised on the hearing thereof as to the competency of the *Institut Canadien* as universal legatee of the late Petitioner to continue the appeal, and the appeal was revived accordingly.

Mr. *Doutre*, Q.C. (of the Canadian Bar) and Mr. *Bompas* for the Appellant.

Mr. *Matthews*, Q.C. and Mr. *Westlake*, Q.C. for the Respondents.

Mr. *Bompas*, as to the competency of the *Institut Canadien* as universal legatee to continue the appeal, submitted that, according to the French Canadian law, whatever the nature of the action was, even though the death of the Plaintiff put an end to the right sought to be enforced by the action, his heir or personal representative might continue the action for the purpose of enforcing his right to costs. See also *Canada Code of Civil Procedure*, sects. 438 and 1154. [Mr. *Matthews* denied that there was any pecuniary interest, but admitted that under the *Canadian Code of Procedure* the heir of a person who has once instituted an appeal may continue it.] [LORD SELBORNE:—There are three questions with regard to costs in this case—(1) of the original hearing; (2) under the decree; (3) of this appeal. Is there any rule in *Canada* providing an appeal as to costs only?] Appellant has a *locus standi* simply on the ground that the question of costs gives a pecuniary interest. 1 *Pigeau*, 342, par. 4. As to the Canadian judges refusing to allow the recusation to be filed: 1st. The recusation was well founded, for when the principal question in the cause is such that the Judges admit that they believe they will render themselves liable to ecclesiastical pains and penalties if they decide it one way they are liable to be recused. It is not at all unusual in the French Courts for all the Judges to be objected to. The law at present relating to recusation is contained in sect. 176–191 of the *Code of Procedure*. There was at any rate no power in the Court to refuse to receive a petition of recusation when presented, even though in itself invalid. An English Judge is incapacitated from trying a case on the ground of self interest. In French law he is recusable if he has made

known his opinion or professionally taken part on either side: 1 *Pigeau*, 366, 367.

There is no decision as to the *status* of the Roman Catholic Church in *Canada*. There is a sense in which it is an established church. If it is not true that the Roman Catholic Church is established, then it is a voluntary association, with certain rights and privileges which have not been lost by the cession of *Canada* to *England*, which cannot be taken away by the bishops, and which are protected by law. As to the remedy resorted to, wherever a mandamus will lie in *England* it will lie in *Canada*. If this is an established church a mandamus will lie to compel ecclesiastical burial; if it is a voluntary church, then, under Article 1022 of the *Canadian Procedure Code*, wherever there is a corporation a mandamus will lie against the corporate officers. [LORD SELBORNE:—Are the ecclesiastical authorities recognised by law in *Canada?*] Yes, up to the time of the cession the Roman Catholic Church was established, and the cession did not alter their civil rights, although all appeal to the Pope is shut out by the Statute 1 Eliz. c. 1, which transfers appeals from the Pope to the Crown of *England*. [SIR R. PHILLIMORE:—Since the cession has there been no appeal to the Pope in *Canada?*] Such appeals, if any, are in contravention of 1 Eliz. [LORD SELBORNE:—That Statute is not understood to make it an offence at law for Roman Catholics in this country or in *Ireland* to carry appeals to the Pope. The Pope is a sort of arbitrator taking a legal view of their position, whom they may consult upon the question.] Possibly such an appeal would, under the statutes, involve an Appellant in pains and penalties. Here the bishop did not pronounce judgment, and the right remedy is in the Civil Courts. [LORD SELBORNE:—The complaint is that burial was offered in that portion of the cemetery which was set apart for persons not in possession of full rites of the Church.] Which is set apart for such, and also for those persons who are not Roman Catholics. [SIR R. PHILLIMORE:—No Protestant can claim burial there.] That is doubtful, but at least the *fabrique* had a right to grant permission for their burial if it saw fit. [LORD SELBORNE:—By your petition you complain of the refusal of sepulture, not of sepulture in a particular manner.] We ask for it according to usage and law, which involves sepulture with the services of the

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Church in consecrated ground. The peremptory writ proceeded in the form of our application. We alleged our Roman Catholic *status*, and that we were a parishioner of the parish of *Montreal*. [SIR BARNES PEACOCK:—With regard to the religious service, how can a corporate body be ordered to read it?] The parish concerns are governed by the *curé* and *marguilliers*, and the mandamus was directed to the persons who were to perform the act, and not against the corporation.

Our claim is that we are entitled to full ecclesiastical burial, and if that cannot be obtained, at least that the body be placed in the consecrated ground. The French Civil Courts enforced ecclesiastical rites, sacraments, and so on, because it was a species of libel and public disgrace for them to be refused. The civil *status* of a Roman Catholic involves in all Civil Courts certain rights. [LORD SELBORNE:—Your petition does not claim the *status* which involves the right to ecclesiastical burial. The expression "usages of law" means general usages of general law. It does not claim any special rights arising out of a particular ecclesiastical condition.] On the evidence it does not appear that there was anything amounting to a valid excommunication according to the French law, and the Defendants have not alleged or proved any matter which could at all deprive *Joseph Guibord*, according to the French ecclesiastical law, of his *status* as a Roman Catholic. [SIR BARNES PEACOCK:—Would a mandamus lie to compel the *curé* to do what he was forbidden from Rome to do?] Certainly. The Civil Courts of *France* compel ecclesiastical officers to perform rites. The French Roman Catholic law, by virtue of the Gallican liberties, differed from Roman Catholic law in other countries. The French Courts have frequently compelled ecclesiastical burial. French Roman Catholics were entitled to appeal to the Civil Courts in matters ecclesiastical wherever the ecclesiastical authorities transgressed the canons recognised by the French Church. This right is treated by the French legal authorities as part of the common law of the land, not conferred on Frenchmen by statute, but resting on the ground that the King was the source of all authority: *Merlin's Répertoire, tit.* '*Gallicane Liberté.*' The Crown of France was the head of the ecclesiastical as well as the civil portion of the state, and had absolute jurisdiction in ecclesiastical as well as civil

matters. In *Canada*, up to the time of the cession, the Canadian Courts had power to hear both classes of cases.

It has been admitted by the Respondents and the Judges of the Courts below that, according to the old French law, the Superior Courts called Parliaments had authority to prevent any abuse by the ecclesiastical authorities of their powers. A long series of decisions established what was the Ecclesiastical and Canon Law in force in *France*, and the Civil Courts restrained all acts of priests or bishops contrary to such ecclesiastical law or to the civil law of the country, whether in the way of omission or commission. The proceedings for this object were termed *appels comme d'abus*, and the Civil Court enforced upon the Roman Catholic clergy the administration of the Sacraments, and the taking off of excommunication when the former had been refused, or the latter imposed in contravention of the ecclesiastical or civil law of *France*.

The *Conseil Supérieur* of *Quebec* was established in 1663 by the French king, by an edict which gave to it power "to hear all causes, civil and criminal, to judge finally or in last resort according to the laws and ordinances of his kingdom, and to proceed as far as might be in the form and manner practised upon resort to the Court of the Parliament of *Paris*."

Finally, the Canadian Legislature succeeded to the powers of the Parliament of *Paris*. The powers of the Court of Queen's Bench were derived from 34 Geo. 3, c. 6 (*Colonial Act*), the powers of the Superior Court were derived under *Consolidated Statutes of Lower Canada*, p. 667, see chap. 78, ss. 4 & 6; the powers possessed by the former Court of Queen's Bench being expressly transferred to the present Superior Court by the provincial Act, 12 Vict. c. 38, s. 8. [Mr. *Westlake* admitted that the Superior Council of *Quebec* was entitled to hear *appel comme d'abus*. What that *appel* was is another question.] As to the powers exercised by the Civil Courts over burial: *Merlin's Répertoire, tit.* "*Sepulture*," Nos. 1 and 2. [LORD SELBORNE:—The cemetery there spoken of corresponds with an English parochial churchyard.] This cemetery had all the incidents of an ordinary Roman Catholic churchyard. Two systems of parishes overlie each other; one the Church of *England*, the other the Roman

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Catholic, each independent of the other, each regulating its own affairs, and a Roman Catholic is entitled as of right to be buried in the Roman Catholic churchyard unless he has been validly excommunicated: *Merlin's Répertoire, tit.* "*Sepulture,*" No. 2, case of *Jean Alexandre Boileau.* [SIR ROBERT PHILLIMORE:—May not a man be excommunicated by notoriety?] *Merlin* never mentions anything except the cases of a heretic and those who have been excommunicated *nominatim.* Some ecclesiastical writers mention cases like murder. The Decrees of the Council of *Trent* were held to be contrary to the common law of *France* because they contained the very clause upon which the bishop relied in this case: *Denisart, tit.* "*Sepulture,*" 11, 12, 13, 16. [LORD SELBORNE:—Can you shew that the Canadian Civil Courts have, directly or indirectly, exercised ecclesiastical jurisdiction since the cession?] Yes; indirectly—a child was ordered to be baptized; see *Harnois* v. *Rousse.*

Even if, on the other hand, the effect of the cession has been to disestablish the Roman Catholic Church and deprive the Civil Courts of the power they possessed of ordering the performance of ecclesiastical rites, it must then be decided whether according to the rules of the voluntary association *Guibord* was entitled to burial *simpliciter* in the reserved part. [SIR MONTAGUE E. SMITH:—If you claim burial there without the rites it is questionable whether such claim is not contrary to the rules of the association.] We ask for the whole order, though only half of it may be enforceable.

Ecclesiastical law has become part of the common law of *Canada* because it is part of the civil rights of the inhabitants. [He referred to the articles of capitulation of *Quebec* and *Montreal,* the treaty founded on those articles, and the *Quebec Act* (14 Geo. 3, c. 83, ss. 4, 5.)] The powers of the Superior Council were transferred to the Courts in *Canada.* Immediately after the cession a governor general was sent out, and no power except his will and pleasure established any Court until 34 Geo. 3, c. 6. [LORD SELBORNE:—The new Courts could exercise civil jurisdiction with regard to ecclesiastical matters. That does not include the power to direct the performance of religious ceremonies.] *Jousse,* in his *Gouvernement des Paroisses,* treats the public refusal of a sacrament

as a civil injury in the nature of a libel. [LORD SELBORNE:—What has been done in *Canada* to introduce the kind of jurisdiction which you invoke?] Examples of its exercise are found in the published collection of Edicts and Ordinances of *Conseils Supérieurs;* see also *Consolidated Statutes of Lower Canada,* c. 18, s. 45; and the statutes endowing Protestant clergy: *Quebec Act;* 31 Geo. 3, c. 31, s. 35; 18 Vict. c. 2; statutes regarding establishment of Roman Catholic schools and the constitution of Roman Catholic parishes. [LORD SELBORNE referred to 4 Geo. 4, c. 31]; 2 Vict. c. 29; 31 Geo. 3, c. 6.

A *fabrique* is the general body of the parishioners who under the common law of *France* are entitled to all the temporalities of the parish. Parishioners in *England* are not a corporation, in *France* they are: 1 Will. 4, c. 51; 2 Vict. c. 29; 13 & 14 Vict. c. 44; 16 Vict. c. 125; 18 Vict. c. 112; *Consolidated Statutes of Lower Canada,* c. 19. The Superior Court has therefore a right to control them, and accordingly the Courts have on several occasions exercised jurisdiction in ecclesiastical questions; *Harnois* v. *Rousse* (1); *Jarrett* v. *Sénécal* (2); *Larocque* v. *Michon* (3); *Maletti* v. *Caron* (4); *Lapointe* v. *Gosselin* (5). The rights of the parties cannot be affected by the decisions of any one deriving his authority from *Rome*; see *O'Keefe* v. *Cullen* (6). A foreign potentate may not be selected as arbitrator: *Phillimore's* International Law, vol. ii. The Pope could only exercise authority as derived from the civil power and with its consent. The Respondents justified themselves by a decree of *Truteau* acting under authority from Rome. [LORD SELBORNE:—It is a most important point whether 1 Eliz. excludes consensual jurisdiction. The authority which sect. 16 excludes is ascribed to the Crown by sect. 17.] The Canadian Roman Catholics if treated as a voluntary body were associated together for religious purposes under rules alterable in some respects. They were alterable whenever by the previous law there was a power capable of altering them. It is for the Respondents to prove the alteration, the starting point being the

(1) C. C. *Montreal,* No. 1021, Judgment, Dec. 7, 1844.
(2) 4 Low. Can. Jur. 213.
(3) 1 Low. Can. Jur. 181; and see 2 Low. Can. Jur. 267.
(4) 29th Sept., 1854, unreported.
(5) Unreported.
(6) Ir. Rep. 7 C. L. 319.

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common law as received from *France* before the cession: see *Green* v. *African Methodist Episcopal Society* (1). As to consensual agreements, see *Black and Whitesmiths Society* v. *Vandyke* (2); *Long* v. *Bishop of Cape Town* (3); *Ferguson* v. *Earl of Kinnoull* (4).

As to the form of the proceedings, the objection that the *curé* was not personally a party was not taken till after judgment. The ecclesiastical property of the Roman Catholic parish vested in the Roman Catholic parishioners; the management in the *fabrique*: *Consolidated Statutes*, c. 19. Service of writs must be on the *curé* and the *marguillier* in charge. The *curé* therefore is sued both in his corporate capacity and also in his individual capacity. [LORD SELBORNE:—The *curé* is only sued in his corporate capacity.] [SIR BARNES PEACOCK:—If he is sued personally the mandamus can be enforced by imprisonment, if as a corporation it can only be enforced by fine.] [SIR MONTAGUE E. SMITH:—You do not allege any personal duty on the part of the *curé*.] There was no writ of mandamus in the old French law, and the niceties of the English law are not applicable to the Canadian practice: *Civil Procedure Code*, Art. 20. The prerogative writs were introduced by English lawyers, and finally by articles of *Civil Procedure Code*. The writ was not bad for enjoining the performance of two duties, and if it were, the objection was raised too late (5). See *Consolidated Statutes*, c. 88; *Civil Procedure Code*, Arts. 120, 1022, *et seq.*; *Jousse, Gouvernement des Paroisses*, p. 75; *Civil Procedure Code*, Art. 1238; *Civil Code*, Arts. 43 and 44. As to mandamus being the proper form of proceeding, see *Tapping* on Mandamus, p. 59; *Reg* v. *Coleridge* (6); *Ex parte Blackmoor* (7). [LORD SELBORNE:—*Reg.* v. *Coleridge* is an authority directly against you.] In *Canada* the *fabrique* is a corporation, which distinguishes that case. *Reg.* v. *Stewart and Another* (8); *Reg.* v. *Barker* (9). The Respondents object that in this case an ordinary summons and petition was issued under sect.

(1) 1 Sergeant & Rawle, p. 253.
(2) 2 Wharton's Pennsylvanian Reports, p. 308.
(3) 1 Moore, P. C. (N.S.) 411.
(4) 9 Cl. & F. 251.
(5) See *Tapping* on Mandamus, p. 315, and cases there cited from 2 M. & S.; *Reg.* v. *Abingdon*, 2 Salk. 699; *Reg.* v. *Tregony*, 8 Mod. 112.
(6) 2 B. & A. 806.
(7) 1 B. & Ad. 122.
(8) 4 P. & D. 349; 10 L. J. (N.S.) 40, M. C.
(9) Burr. 1265.

(3 Sc. & Jur. 1805.

119 of *Civil Procedure Code*, and was served instead of a writ of mandamus. On a true interpretation of the *Code of Civil Procedure* that is all that was required, and the objection is at most merely technical, and was taken too late. Technical objections are not to be availed of in the Privy Council; see *Le Breton* v. *Ennis* (1). [LORD SELBORNE:—Mere formal and technical objections, if there is no substance in them, are seldom the foundation of their Lordships' judgments.]

Mr. *Doutre*, Q.C.:—

Anterior to the cession of the country by *France* to *Great Britain* the Courts in *Canada* constantly compelled the administration of the sacraments if they were unreasonably withheld. There are numerous precedents to shew that that was done in *France*. There is no precedent of the refusal of sepulture in our country.

No rule *nisi* for a mandamus is ordered unless there is a *primâ facie* case. [LORD SELBORNE:—In *England* that would not be so.] *Guibord* was liable during his life, and his estate after his death, to contribute to the purchase and maintenance of the cemetery, from which he had been excluded. *Consolidated Statutes*, chap. 18, sect. 5. [LORD SELBORNE:—Would excommunication have relieved him from that liability?] Exemptions are provided for in sect. 23. [LORD SELBORNE:—I suppose excommunication puts an end to the civil *status* of a Roman Catholic. Mr. *Matthews*, Q.C.:—An excommunicated person does not cease to be a Roman Catholic. He is a baptized person.]

The law of which the Canadian Courts take judicial notice is the old French law, striking out all those parts which exclude the supervision of the Civil Courts over ecclesiastical proceedings.

The French law with the Gallican liberties was the law of the land up to the cession. There is no precedent of a person being buried without the ecclesiastical ceremonies in the larger part of the cemetery. The question did not arise until recent changes in the Roman Catholic Church. When it was reported to the Duke of *Milan* that a priest had refused to bury a man because

(1) 4 Moore, P. C. 323.

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some dues had not been paid, the sentence was that the priest should be tied alive to the dead man and buried with him. Whatever precedents there are, are in our favour. *Durand de Maillane's* Dictionary, tit. "*Sepulture.*" The Courts in *Canada* have all the powers which the French Courts had before the cession. As regards the constitution of the Superior Council of *Quebec*, according to Mr. Justice *Berthelot* the edict creating the Superior Council not having mentioned ecclesiastical cases excluded them from the cognizance of that Council; but the word "civil" is used and includes ecclesiastical cases, see Edits and Ordinances, 1855, vol. ii., pp. 129, 130 and 160; *Histoire de la Colonie Française de l'Abbé Faillon*, vol. iii., p. 512, and Edits and Ordinances, vol. ii., p. 163; also a case, vol. ii., p. 322. The question in that case was whether a bishop's see was vacant or not. A dispute in consequence arose over the remains of the late bishop as to who should proceed to the burial. The Governor prohibited them from celebrating any solemn service until the differences had been decided by the Council. He cited seven or eight *appels comme d'abus*, and four other cases in the years 1738, 1741, 1750, and a subsequent year, in vol. ii., pp. 193, 204, 228, and 231. [LORD SELBORNE:—It amounts to an assertion by the State of what we call the royal supremacy.] Further instances of *appels comme d'abus*, Edits and Ordinances, vol. i., p. 79, 104, and see *Histoire de la Colonie Française*, vol. iii., p. 430; *Denizart*, vol. ii., p. 606, vol. iii., pp. 444 and 490, vol. iv., pp. 325 and 865, and vol. v., p. 50. The *appels comme d'abus* are still entertained by Courts in *France*. As to excommunication there are thirty or forty cases of interference by French Courts. [LORD SELBORNE:—It is necessary for their Lordships to make themselves acquainted with the law of *Canada*, but I do not understand that any controversy can arise with regard to the law of *France*.] He referred to the order establishing the Superior Council, in 1663: Edits and Ordinances, vol. iii. (first edition), p. 21-24. Its powers are transferred to Court of Queen's Bench by statute 1794, 34 Geo. 3, c. 6; earlier Act is 25 Geo. 3, c. 2. This matter is included in their jurisdiction unless it is not a civil matter, but an *appel comme d'abus* is a civil remedy: see *Durand de Maillane, tit.* "*Droit Canonique.*" It is not asked in terms that ecclesiastical ceremonies

be granted, but civil burial according to law and usage. [LORD SELBORNE :—Do you contend that civil causes mentioned in the statute of 1794 included ecclesiastical causes without exception —for instance, the administration of sacraments ?] Yes, they are of a civil nature when brought before a civil Court. "Of a civil nature" included criminal law. The Superior Court has all the powers of the Queen's Bench. To ask the right of burial is neither a spiritual nor ecclesiastical cause: see *Denizart, tit.* "*Sepulture.*"

Guibord had not incurred censures which would have involved deprivation of ecclesiastical burial: *Héricourt's Lois Ecclésiastiques,* vol. i., p. 171, Nos. 141 and 142. Here there was a general excommunication of all the members of the library, but not an excommunication of any particular person. [LORD SELBORNE :— Is there anything which shews that it is necessary that a man should be excommunicated *nominatim ?*] *Jarret* v. *Sénécal* (1). [LORD SELBORNE referred to *Titchmarsh* v. *Chapman* (2).] [Mr. *Matthews :*—I do not propose to bring *Guibord* under the head of *interdictus nominatim ;* but he was a public sinner, having continued to belong to the library after the prohibition of the Church, and not having partaken of paschal communion.] The sacraments were refused to him because he was a member of the *Canadian Institute,* but extreme unction was granted to him. As to the jurisdiction exercised by the Courts under the British rule, see *Champlain* v. *Vezina* (3), *Larocque* v. *Michon* (4), and *Lapointe* v. *Gosselin* (5). [LORD SELBORNE :—The authorities cited are all actions for damages. There is no case similar to the case now before the Court ?] *Wurtele* v. *Bishop of Quebec* (6). [LORD SELBORNE :—In that case it was admitted that to enforce the right of burial in a parish churchyard was a thing competent by mandamus. It does not relate to the manner of burial or to the rites to be observed in burial.] *Les Syndics de la Paroisse de Lachine* v. *Fallon* (7). He also referred to *D'Aguesseau,* vol. v., p. 411 ; *Lynch* v. *Papin* (8) ; *Eastern Township Bank* v.

(1) 4 Low. Can. Jur. 213, 233.
(2) 3 Curteis, 703.
(3) Unreported.
(4) 1 Low. Can. Jur. 181 ; and see 2 Low Can. Jur. 267.
(5) Unreported.
(6) 1 Low. Can. Rep. 414 ; Déc. des Tribunaux, tom. ii. p. 68.
(7) 6 Low. Can. Jur. 258.
(8) 4 Low. Can. Rep. 81.

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Pacaud (1). From the beginning there was not the slightest difficulty about what was wanted and what was refused.

Mr. *Matthews*, Q.C., for the Respondents:—First, as to recusation. [LORD SELBORNE:—None of their Lordships have the least doubt about that.] Secondly, as to the form of proceedings. The writ of mandamus was issued under the wrong address—that is, to the *fabrique*. Although the Court may modify the rule *nisi* which precedes the writ, yet when once the writ has issued it can no longer be modified. [SIR BARNES PEACOCK:—This is not a prerogative writ. It was a writ under the Code.] The Canadian procedure does away with the rule *nisi* for mandamus. According to English practice, if the writ orders two things to be done, and on the return it appears that part of the command in the writ could not be supported, the writ must fail altogether: *Reg.* v. *East and West India Docks and The Birmingham Extension Railway Company* (2); The *curé* is the person to whom this writ should have been addressed, but the *fabrique* is proceeded against under its corporate name. A writ of summons was issued instead of a writ of mandamus in the first instance. The *fabrique* is a corporation or legal person representing the temporalities of the parish, and that legal person is properly designated as *curé et marguilliers*: see *Denizart*, vol. viii., p. 358, tit. "*Fabrique*," p. 381; *Ex parte Lefort* (3); *Reg.* v. *Fabrique de Pointe aux Trembles* (4).

As to service of writs, *Code of Procedure*, Arts. 65, 49. As to the writ, it has no mandatory part, and is therefore defective. A peremptory mandamus cannot issue until after the writ of mandamus: *Civil Procedure Code*, Arts. 1022, 1024, 927, *et seq.* The order prayed for was in the first place to bury according to law and usage. The *fabrique* cannot bury ecclesiastically, and the *curé* personally is not before the Court. It is not the duty of the *fabrique* to find a burial ground. People must provide burial places for themselves, both according to old French law and

(1) Décisions des Tribunaux (Low. Can. Rep.), vol. xvi., p. 139. See also *Herrick* v. *Sixby*, p. 167; *Duhault* v. *Pacault*, p. 185; *Taylor* v. *Mullin*, p. 398; *Eastly* v. *Fabrique of Montreal*, p. 421; *Beaudry* v. *Corporation of Montreal*, 432.

(2) 22 L. J. (Q.B.) 380; 2 E. & B. 466. 17 Jun 1881.

(3) 6 Low. Can. Jur. 200.

(4) 2 Revue de Législation, p. 53.

modern Canadian law. [SIR R. PHILLIMORE:—But given the parochial burying ground, is there a legal duty in the *fabrique* to put the body in?] [SIR BARNES PEACOCK:—You have admitted a duty in the pleadings.] In the second place to register the burial. As to the duty of the *fabrique* or of the *curé* personally with respect to register: *Civil Code*, ss. 43, 49, 57, and *Civil Procedure Code*, ss. 1236 and 1238. It is throughout the personal duty of the *curé*, and not the corporate duty of the *fabrique*, In fact, both duties mentioned in the writ, namely, those of registration and ecclesiastical burial, are not incumbent on the *fabrique*. [SIR BARNES PEACOCK:—You admit in the pleadings that the Respondents were ready, as civil officers, to bury the man civilly, and to authenticate the interment. [LORD SELBORNE:—You are bound by those admissions.] In all the cases of *appels comme d'abus* no writ is addressed to the *fabrique* but to the *curé* personally.

The *requête* and writ are bad for uncertainty, directing us to bury according to usage and law. The whole contest is whether the parties should have civil or religious burial. A writ will be quashed for uncertainty; and here it is doubtful what was asked for: see *Tapping* on Mandamus, p. 357. [SIR MONTAGUE E. SMITH referred to *Reg.* v. *Southampton Docks Company* (1).] Civil burial has never been refused. [LORD SELBORNE:—If they are only entitled to civil burial the case falls to the ground. The contention is, that if they have the right of ecclesiastical burial they are entitled to be buried in consecrated ground.] [SIR MONTAGUE E. SMITH: If he is entitled to ecclesiastical burial, what order can we make?] It would not be competent for the Court to order anything short of it; it could not order civil burial in a particular part of the cemetery. This Court will not direct civil burial *eo nomine* in the consecrated part. They claim burial in that part on the ground that they are entitled to ecclesiastical burial. Both usage and law sanction a division of the cemetery—one for ecclesiastical, the other for civil burial: *Denizart, tit.* "*Cemetery.*" [SIR R. PHILLIMORE:—Who has the right of determining the place of sepulture?] The *fabrique*. If ecclesiastical burial

(1) Law Rep. 4 H. L. 449.

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was wanted it was not asked for before the writ issued. There was no demand and refusal. There was no civil right to ecclesiastical burial which can be enforced by civil tribunal, at any rate not by mandamus. A peremptory mandamus admits of no alternative, but performance of the duty enjoined, therefore there must be a legal right by the law of the land to ecclesiastical burial. [SIR ROBERT PHILLIMORE:—If he shews that he is a Roman Catholic and a parishioner, is he not *primâ facie* entitled to ecclesiastical burial, and is it not for you to shew that he is disqualified?]

No right by the law of the land is shewn, for the Roman Catholic Church was not an established church. Though there may be a right by consensual contract or under consensual rules, that would be a right enforceable by damages, and does not involve a duty enforceable by mandamus. Such a right is of a spiritual nature. Even if there is enough of temporality mixed with it so as to justify the interference of a Civil Court, still the right has been determined under the consensual rules by the decision of the Bishop. As to *appels comme d'abus*, that jurisdiction has been a constant source of dispute, both in Parliament and in the Church. The Privy Council cannot undertake the control and internal administration of Roman Catholic communities. [LORD SELBORNE:—The application is founded on the allegation that *Guibord* at the time of his death was in possession of his civil *status* as a Roman Catholic.] There is nothing in the law of *Canada* to shew that any right against the Church accrues from that *status* so far as it technically exists. The *status* involves certain duties. See the Acts constituting certain parishes, and the consolidating Act of 2 Vict. c. 29, and *Civil Code*, Arts. 15 to 29 and 39 to 70, referring to acts of birth, marriage, burial, or religious profession. These can all be completed without religious ceremonies. See sections 127, 128, and 129.

As to the jurisdiction of *appels comme d'abus*, we have not thought it worth while to argue whether the *Conseil Supérieur* had that jurisdiction. That depends upon the examination of very doubtful and unsatisfactory precedents. The *Conseil Supérieur* was a body having legislative as well as judicial powers. The *appel comme d'abus* was a special proceeding, which commenced in a

special manner: see *Fleury's Institution au droit ecclésiastique.* This was a case of mandamus under *Civil Procedure Code,* sect. 1022.

The *appel comme d'abus* was recognised by the Liberties of the Gallican Church. The King of *France* appointed ecclesiastical judges with civil jurisdiction in every case where ecclesiastical questions were concerned, and he retained the power of restraining those judges from exceeding their limits. He referred to the Edict of 1695—the celebrated edict concerning ecclesiastical jurisdiction. It was the intention of that edict that the ecclesiastical judges should be the sole judges in such matters as are there referred to. In its origin the *appel comme d'abus* was a machinery for keeping the two jurisdictions, ecclesiastical and civil, distinct. It was extended in practice by the French Parliament, so as to deal with matters purely spiritual. Such spiritual jurisdiction cannot apply in *Canada,* for the Roman Catholic Church has ceased to be the established church. The old ecclesiastical law of *France,* including the Edict of *Nantes* with all its clauses, cannot apply in *Canada* after the conquest. The root of it was in the ecclesiastical jurisdiction and supremacy of the Church of *Rome.* There is no recognition in the Code of the Roman Catholic Church as an ecclesiastical body. The Roman Catholic Church in *Canada* is like the Free Kirk in *Scotland.* It is a body not established but tolerated. The Court will look at its rules and constitutions in order to see what are the rights and duties of its members *inter se. Guibord* is only entitled to ecclesiastical burial and prayers under the Roman ritual. There is no public duty to give it with respect to the performance of which a mandamus would lie. [LORD SELBORNE:—Evidence was offered as to the law of the Roman Catholic Church in *Canada,* and several times rejected by the Court on the ground that it would take judicial notice of its provisions.]

As to the point of mandamus, see *Jarret* v. *Sénécal* (1); *Harnois* v. *Rousse* (2); *La Rocque* v. *Michon* (3); *Malette* v. *Caron* (4); *La*

(1) 4 Low. Can. Jur. 213.

(2) C. C., *Montreal,* No. 1021, Judgment, Dec. 7, 1844.

(3) 1 Low Can. Jur. 181; and see 2 Low. Can. Jur. 267.

(4) Unreported.

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Pointe v. *Gosselin* (1). A mandamus will only lie where there is a legal duty created by law. With regard to English authorities, in *Long* v. *Bishop of Cape Town* (2) the Court reviewed the act of the bishop because the Appellant was injured in a temporal right, viz., the right to have the income and emoluments, and it disclaimed interference with spiritual authority. So also in *Bishop of Natal* v. *Gladstone* (3), and *Macmillan* v. *General Assembly of the Free Church of Scotland* (4). This Court never interferes with the sentences and decrees of the authorities constituted by the regulations of a voluntary body on the merits. There was sufficient ground for the refusal of sepulture according to the rules of the religious body to which *Guibord* belonged. The bishop's order, whether wise or foolish, was made by the authority to which the law had remitted the decision, and it bound *Guibord;* he could not have ecclesiastical burial if he died in open sin against the Church.

Mr. *Westlake*, Q.C., on the same side:—

As to the form of the writ, by the Code, Arts. 1022, 1027, and the law of *Canada* preceding the Code, the writ must contain an order; a summons to shew cause is insufficient. The writ must command the party to do the act required or to shew cause to the contrary on a day fixed. [SIR BARNES PEACOCK referred to Art. 1024 of the *Code of Civil Procedure*, as incorporating Arts. 998 to 1002.] *Queen* v. *La Fabrique of Pointe aux Trembles* (5). In *Ex parte Wurtele* (6), cited on the other side, the procedure was wholly irregular. *Lynch* v. *Papin* (7), cited on the other side, was a case of *quo warranto*. *La Pointe* v. *Gosselin* (8) is an authority on our side. *Hibbard* v. *Barsalou*, a different case from that cited on the other side. [SIR BARNES PEACOCK:—Was there power to grant a mandamus before the *Consolidated Act* of 1860?] 12 Vict. c. 41, regulated proceedings of mandamus down to the Code, but

(1) Unreported.
(2) 1 Moore, P. C. (N.S.) 461.
(3) Law Rep. 3 Eq. 1.
(4) Quarter Sessions Cases (2nd Series) vol. xxii. 290; vol. xxiii. 1314; and vol. xxiv. 1282.
(5) 2 Revue de Législation, p. 53.
(6) 1 Low. Can. Rep. 414.
(7) 4 Low. Can. Rep. 81.
(8) Unreported.

12 LC Jur NS 805.

that was not the first commencement of mandamus in *Canada*. The *curé* has thrown upon him by the Codes the duty of taking care of the register, not as a member of the corporation, but as a minister of religion. (*Civil Code*, Art. 44.) Since the cession of *Canada* there has been no jurisdiction in Courts of that country to give a remedy of this kind.

The ecclesiastical law existing among members of the Roman Catholic body is no longer, since the cession, the law of the land in any respect whatever: it is the law existing among them solely by contract. [LORD SELBORNE:—Evidence tendered on that principle in the Lower Court was objected to.] The objection was to oral proof of a written law. When a Church once established is subsequently disestablished, the Courts are not compelled to ignore the law which while the Church was established was familiar to them. [LORD SELBORNE:—In the *Irish Church Act* there is a clause which says that the existing laws shall be taken as a starting point.] Part only of the ecclesiastical law falls to the ground through disestablishment. So far as it is of such a nature that it could become the contract of the parties it furnishes a starting point of which the Courts will take judicial notice, leaving the changes therein to be proved by evidence: *Bishop of Natal* v. *Gladstone* (1). [SIR ROBERT PHILLIMORE:—It is difficult to reconcile that judgment with the judgment given by Lord *Kingsdown*.] The difficulty has been cleared up by what has taken place subsequently.

As to the position of the Roman Catholic Church, we say that it has been completely disestablished. The argument on the other side, that it was only disestablished as regards those without its pale, and remains established as regards the parties to it, involves great inconvenience. [LORD SELBORNE:—It was suggested that the monastic statutes involving civil death were referred to by the Code.] *Civil Code*, Arts. 70–74, are the articles about the religious profession, and contain nothing about civil death. The perpetuity of religious vows is nowhere made part of the law of the land. The change made in the condition of the Roman Catholic Church by the cession is illustrated by the treaty of

(1) Law Rep. 3 Eq. 1.

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1763 and the *Quebec Act*, 14 Geo. 3, c. 83, neither of which reserves the binding obligation of any law, but secure to the Roman Catholic inhabitants of *Canada* the free exercise of their religion. See sects. 5 and 8 of the Act. [LORD SELBORNE referred to sect. 17.] The treaty secured to them their ecclesiastical rights "so far as the laws of *Great Britain* would permit." After the cession the Roman Catholic Church disused the old Courts of the bishops' officials. If they had been acting by the ancient law of *France*, the bishop, under the Edict of 1695 (see *Champeaux, Droit Civil Ecclésiastique, et Anciennes Lois Françaises, Isambert, tom.* 20) was authorized to appoint officials who should hold regular Courts, and from whose decisions there would be the *appel comme d'abus*.

The Acts quoted on the other side referring to the temporal affairs of parish churches, are no proof that the Church was in some measure established [Lord *Selborne* referred to Consolidated Statutes, c. 18, sects. 5, 8.] The disestablishment of a church does not necessarily involve the extinction of the corporations which existed within it as civil bodies during the period of its establishment, and on the disestablishment of the Church in *Canada* such corporations continued to exist, and were a proper subject for the law of the land to regulate with regard to their civil rights. Nothing was done analogous to the provisions of the *Irish Church Act*, 32 & 33 Vict. c. 42, s. 13. The *fabrique* in question in this case is a sufficient example that the effect of the cession was not to dissolve ecclesiastical corporations existing in *Canada*. The disestablishment of the Church in *Canada* is shewn indirectly in several ways; (1) the treaty and the *Quebec Act* gave liberty to exercise religion, but did not perpetuate its laws; (2) the absolute incompatibility between the establishment of the Roman Catholic religion, which involves a certain amount of communion with *Rome*, and the laws which prohibit the sovereign of this country from holding any communion with *Rome* (see *Quebec Act*, s. 5). As to ecclesiastical corporations existing in a disestablished church, see *Bishop of Capetown* v. *Bishop of Natal* (1); *Consolidated Statutes of Lower Canada*, c. 42. [SIR ROBERT P. COLLIER:—

(1) Law Rep. 3 P. C. 1.

The whole church in *Ireland* is not incorporated, but the body was called a representative church body, which seems to correspond in a large manner with the *fabrique* of a Canadian parish. The corporation is for the purpose of holding lands and not further or otherwise.] As to the Roman Catholic bishops in *Canada* being corporations, they were incorporated by 12 Vict. c. 136; and see 24 Vict. c. 128, which concerns one in *Upper Canada*, where it is not pretended that the Roman Catholic church is established.

As to the edict of 1695 being enforced though not registered, see Edict of August 2, 1717, and *Durand de Maillane, Dict. de Droit Canonique, tit.* "*Officiel.*" Besides the disuse of officialities, consensual rules and canons have been passed for the governance of the Church without the sanction of the State. Its laws have not for more than a hundred years been recognised in *Canada* as the law of the land: *Malette* v. *Caron* (1); *Larocque* v. *Michon* (2); *Harnois* v. *Rouisse* (3); *La Pointe* v. *Gosselin* (4); *Jarret* v. *Sénécal* (5); *Reg.* v. *Fabrique of Pointe aux Trembles* (6); *Champlain* v. *Vézina* (7); *Nau* v. *Lartigue* (8); *Forbes* v. *Eden* (9); which latter case shews the limits of the interference of Courts with voluntary bodies. See the judgment of Lord *Cranworth*.

As to whether *Guibord* held according to the voluntary rules of Roman Catholics the particular *status* of a person entitled to burial with religious rites, such *status* was determined by the decision of the bishop. For the effect of such decision see *Long* v. *Bishop of Capetown* (10); see, also, *Warren's Case*, cited in *Long* v. *Bishop of Capetown* (10). When parties have determined not merely what their rights are, but the tribunal to which they are to submit, and the tribunal decides them in a way not contrary to natural justice, they are bound thereby. It is not contrary to

(1) Unreported.
(2) 1 Low. Can. Jur. 187, and 2 Low. Can. Jur. 267.
(3) C. C. Montreal, No. 1021. Judgment, 7 Dec. 1844.
(4) Unreported.
(5) 4 Low. Can. Jur. p. 213.
(6) 2 Revue de Législation, p. 53.
(7) Unreported.
(8) Cited by Mr. Justice *Berthelot*, from a note in his possession, since printed in a Canadian pamphlet report of this case in the first two Courts.
(9) Law Rep. 1 H. L., Sc. 568.
(10) 1 Moore P. C. (N.S.) 461, 462.

1 Jur. N.S. 805. 809

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natural justice to refuse ecclesiastical burial in the cases where by the rules of the society it is to be refused. As to the liability to provide a cemetery, see *Comte* v. *Curé and Marguilliers of the Parish of St. Edwards* (1). The right of the *fabrique* to divide the cemetery is proved by its being the universal custom to do so.

Mr. *Bompas*, in reply:—

[LORD SELBORNE:—Their Lordships think, that so far as relates to the form of the summons and the point of registration, you need not trouble yourself. The Respondents being a corporation, have the power at least to perform civil interment and to register.]

The *curé* is, by Roman Catholic law, a part of the *fabrique* for the purpose of religious rites; for such of them at least as are part of the parish duties: *Consolidated Statutes*, c. 88, s. 12. The fact that the right to ecclesiastical rites follows from our being ordered to be buried in the consecrated ground is no objection to making the order: *Queen* v. *Stewart* (2). A mandamus will go to an ancient prescriptive corporation to discharge a corporate duty, *e.g.*, to a railway company to issue a precept. It can hardly be argued that the right has no element in it which would bring it under the cognizance of a Civil Court. As to the supremacy of the Crown, the Pope could not establish an Ecclesiastical Court in *France*, much less in *Canada*, and the publication of a bull would be treason under the old English law. Lord *Coke* says (3), that the Common Law of *England* recognises the supremacy of the Crown, and French writers say that the amount of contentious jurisdiction granted to the bishops and the Pope was derived from the Crown. [SIR BARNES PEACOCK.—Do you say that the Pope could create an Ecclesiastical Court in *Canada*, to decide upon spiritual matters?] No, he could not do so either in *Canada* or in *France*. The Queen could exercise, if she chose, whatever coercive jurisdiction in the Roman Catholic Church the Pope could have exercised under the old French law. It has not, however, been exercised since the cession. As to *appels comme d'abus*, they were appeals from every act of an ecclesiastical nature as from every civil

(1) 2 Revue de Jurisprudence, p. 127. (2) 12 Ad. & E. 773.
(3) See *Caudrey's Case*, 3 Coke's Reports, p. xv.

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act: 2 *Pigeau*, 5; *Larocque* v. *Michon* (1). As to Church being disestablished, see 18 Vict. c. 2 (*Canada*); 31 Geo. 3, c. 6, which recognises the position of the Roman Catholic Church according to its canons, and recognises that the bishop for the purposes of the Church shall have as large powers as the former bishops before the cession.

As to the onus of proving the rules of a voluntary association, the Respondents set up ecclesiastical censures, and in order to prove them they must prove the consensual contract under which the bishop can impose disabilities. If there is no evidence, then the rules of the Church as they existed before the cession may be taken judicial notice of. As to *Guibord* being a public sinner, and the effect of the *Quebec* ritual, see *Durand de Maillane, tit.* "*Ritual.*" A public sinner under French law means a person publicly denounced by a proper tribunal. The term was known to canonists and canon laws from the fourth or fifth century: *Durand de Maillane, tit.* "*Notoriety.*"

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The judgment of their Lordships was delivered by

SIR ROBERT PHILLIMORE:—

This is an appeal from a judgment of the Court of Queen's Bench for the province of *Quebec*, in *Canada*, confirming a judgment of the Court of Review, which latter reversed a judgment of the Superior Court in first instance.

The question which was the subject of these different judgments related to the burial of the remains of *Joseph Guibord*, one of Her Majesty's Roman Catholic subjects, who died at *Montreal* on the 18th of November, 1869.

His widow and representative, Dame *Henriette Brown*, instituted and prosecuted the suit in the Canadian Courts, and was also the original Appellant before their Lordships. She died on the 24th of March, 1873, and by her will devised her property to the *Institut Canadien*, and also appointed them her universal legatees.

This corporation, having accepted the appointment, applied for leave to continue this appeal, which leave was granted by their Lordships on the 26th of June, 1873.

(1) 2 Low. Can. Jur. 267.

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This leave was granted without prejudice to any question which might be raised as to the competency of the institute to continue the appeal. It appeared that the widow had been condemned in the costs in the Canadian Courts, and her universal legatees were therefore, of course, interested in procuring the reversal of these sentences; and the objection to their competency, though mentioned in the "reasons" of the Respondents, was not insisted upon in the arguments before us.

The suit on behalf of the representative of *Guibord* was for a mandamus to *Les Curé et Marguilliers de l'Œuvre et Fabrique de Montréal*, upon receipt of the customary fees, to bury his body in the parochial cemetery of members of the Roman Catholic church at *Montreal*, entitled the *Cemetery of La Côté des Neiges*, conformably to usage and to law, and to enter such burial in the civil register.

La Fabrique de Montréal is a corporation consisting of the *curé* and certain lay church officers called *marguilliers*, whose relation to the church and churchyard is analogous to that of churchwardens in an English parish. This corporation manages the temporalities of the church, which temporalities are also sometimes designated by the title of *La Fabrique.*

La Fabrique de Montréal had the control of this particular cemetery.

The cemetery is divided into two parts, the smaller part being separated from the larger by a paling. In the smaller part are buried unbaptized infants and those who have died *sans les secours ou les sacrements de l'Église;* and (as appears from the evidence) persons who had committed suicide, and criminals who had suffered capital punishment without being reconciled to the Church. In the other and larger part are buried ordinary Roman Catholics in the usual way, and with the rites of the Church.

Neither portion of the cemetery is consecrated as a whole; but it is the custom to consecrate separately each grave in the larger part, never in the smaller or reserved part.

The cemetery is thus practically divided into a part in which graves are, and into a part in which they are not, consecrated.

The circumstances which led to this litigation were as follows:—

Guibord was a lay parishioner of *Montreal.* He appears to have

been of unexceptionable moral character, and to have been, both by baptism and education, a Roman Catholic, which faith he retained up to the time of his death.

In the year 1844 a literary and scientific institution was formed at *Montreal* for the purpose of providing a library, reading-room, and other appliances for education. It was incorporated by a provincial statute (16 Vict. c. 261), under the name of the *Institut Canadien*.

The preamble of this statute recites :—

"Whereas several persons of different classes, ages, and professions, residing in the city of *Montreal* and elsewhere, have formed a literary and scientific association in the said city, under the name of the *Institut Canadien*, for the purpose of establishing a library and reading room, and of organizing a system of mutual and public instruction by means of lectures and courses of instruction."

It then states that the number of members already exceeded 500, that they had a library of 2000 volumes, and a reading-room provided with newspapers and periodical publications. Then follows a prayer to be constituted a legal corporation. The prayer was granted by the Legislature, and the statute incorporates the association, and directs, among other provisions, that the corporation is to make an annual return to the Government of their estates real and personal.

Guibord was one of the original members of this institute.

In the year 1858 certain members of the institute proposed a committee for the purpose of making a list of books in the library, which in their opinion ought not to be allowed to remain therein.

An amendment, however, was carried by a considerable majority to the effect that the institute contained no improper books, that it was the sole judge of the morality of its library, and that the existing committee of management was sufficient.

On the 13th of April in the same year the Roman Catholic Bishop of *Montreal* published a pastoral which was read in all the churches of his diocese, in which he referred to what had taken place at the meeting of the institution, and after praising the con-

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duct of the minority, pointed out that the majority had fallen into two great errors: first, in declaring that they were the proper judges of the morality of the books in their library, whereas the Council of *Trent* had declared that this belonged to the office of the bishop; secondly, in declaring that the library contained only moral books, whereas it contained books which were in the Index at *Rome*. The bishop further cited a decision of the Council of *Trent*, that any one who read or kept heretical books would incur sentence of excommunication, and that any one who read or kept books forbidden on other grounds would be subject to severe punishment; and he concluded by making an appeal to the institute to alter their resolution, alleging that otherwise no Catholic would continue to belong to it. He says :—

"*Car il est à bien remarquer ici que ce n'est pas nous qui prononçons cette terrible excommunication dont il est question, mais l'Église dont nous ne faisons que publier les salutaires décrets.*"

The resolution of the institute was not rescinded.

In 1865 several of the Roman Catholic members of the institute, including *Guibord*, appealed to *Rome* against this pastoral.

They received no answer to their application. But in the year 1869 the Bishop of *Montreal* issued a circular—

"*Publiant la réponse du Saint Office concernant l'Institut Canadien et le Décret de la Sainte Congrégation de l'Index condamnant l'Annuaire du dit Institut pour* 1868."

This circular was dated from *Rome*, July 16th, 1869. He also sent a pastoral letter from *Rome* dated in August of that year, which contained two inclosures; one the sentence or answer of the Holy Office, as printed in the case before us :—

"*Illme. ac Rme. Dne.*

"*Cum in Generali Congregatione S.R. et U.I. habita feria IV. die* 7 *curr. Emi. ac Rmi. Generales Inquisitores jamdiu motam de Instituto Canadensi controversiam ad examen revocassent, singulis mature ac diligenter expensis, A: tuæ significandum voluerunt, rejiciendas omnino esse doctrinas in quodam annuario quo dicti Instituti acta recensentur, contentas, ipsasque doctrinas ab eodem Instituto traditas prorsus reprobandas. Animadvertentes insuper*

laudati Emi. ac Rmi. Patres valde timendum esse ne per hujusmodi pravas doctrinas Christianæ juventutis institutio et educatio in discrimen adducatur, dum commendandum expresserunt zelum ac vigilantiam a te huc usque adhibitam excitandam eamdem [the next word is a misprint] *jusserunt ut una cum tuæ diœceseos clero omnem curam conferas, ut Catholici ac præsertim juventus a memorato Instituto, quousque perniciosas doctrinas in eo edoceri constiterit, arceantur. Dum vero laudibus prosequuti sunt alteram societatem* Institutum Canadense Gallicum *nuncupatam, nec non ephemeridem dictam* 'Courrier de St. Hyacinthe,' *utramque fovendam adjuvandamque mandarunt ut ita iis damnis ac malis remedia quærantur, quæ ex alio præfato Instituto haud dimanare non possunt. Quod a tuæ pro mei muneris ratione communicans omni cum observantia maneo.*

"*Romæ ex Æd. S.C. de P.F. die* 14 *Julii*, 1869, *&c.*"

The other inclosure was a *Decretum* of the "*Congregatio*," to whom the care of the Index was committed, it was as follows:—

"*Decretum.*

"*Feria II., die* 12 *Julii*, 1869.

"*Sacra Congregatio Eminentissimorum ac Reverendissimorum Sanctæ Romanæ Ecclesiæ Cardinalium a SANCTISSIMO DOMINO NOSTRO PIO PAPA IX. sanctaque Sede Apostolica Indici librorum pravæ doctrinæ, eorumdemque proscriptioni, expurgationi, ac permissioni in universa Christiana republica præpositorum et delegatorum, habita in Palatio Apostolico Vaticano, die* 12 *Julii* 1869 *damnavit et damnat, proscribit proscribique, vel alias damnata atque proscripta in Indicem Librorum Prohibitorum referri mandavit et mandat opera quæ sequuntur.*"

Then the names of several works unconnected with the Institute are mentioned. And then—

"*Annuaire de l'Institut Canadien pour* 1868, *célébration du* 24^{me} *anniversaire de l'Institut Canadien le* 17 *Décembre*, 1868. (Decr. S. Officii Feria IV. die 7 Julii, 1869.)

"Itaque nemo cujuscumque gradus et conditionis prædictæ opera damnata atque proscripta, quocumque loco, et quocumque idiomate, aut in posterum edere, aut edita legere vel retinere audeat, sed locorum ordinariis, aut hæreticæ pravitatis Inquisi-

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toribus ea tradere teneatur, sub pœnis in Indice librorum vetitorum indictis.

"Quibus SANCTISSIMO DOMINO NOSTRO PIO PAPÆ IX. per me infrascriptum S. I. C. a Secretis relatis SANCTITAS SUA decretum probavit, et promulgari præcepit. In quorum fidem, &c.

"Datum Romæ, die 16 Julii, 1869."

The pastoral letter containing this inclosure drew attention to the fact that two things were especially forbidden by this *Decretum*:—1. To belong to the institute while it taught pernicious doctrines. 2. To publish, retain, keep, or read the *Annuaire* of 1868. And the bishop also pointed out that any person who persisted in keeping or reading the *Annuaire*, or in remaining a member of the institute, would be deprived of the Sacrament, "*même à l'article de la mort.*"

The Institute held a meeting on the 23rd of September, 1869, and resolved:—

"1. *Que l'Institut Canadien, fondé dans un but purement littéraire et scientifique, n'a aucune espèce d'enseignement doctrinaire, et exclut avec soin tout enseignement de doctrines pernicieuses dans son sein.*

"2. *Que les membres Catholiques de l'Institut Canadien, ayant appris la condamnation de l'Annuaire de* 1868 *de l'Institut Canadien par décret de l'autorité Romaine, déclarent se soumettre purement et simplement à ce décret.*"

These concessions produced no effect.

The bishop in a letter, the last which appears in the case, dated *Rome*, 30th of October, 1869, to the administrator of the diocese at *Montreal* (which that officer received, he says, on the 17th of November, the day before *Guibord's* death), denounces these concessions as hypocritical, and gives five reasons why they are insufficient, the third of which is—

"3. *Parce que cet acte de soumission fait partie d'un rapport du comité approuvé à l'unanimité par le corps de l'Institut, dans lequel est proclamée une résolution tenue jusqu'alors secrète, qui établit en principe la tolérance religieuse qui a été la principale cause de la condamnation de l'Institut.*"

The letter concludes—

"*Tous comprendront qu'en matière si grave il n'y a pas d'absolution à donner, pas même à l'article de la mort, à ceux qui ne voudraient pas renoncer à l'Institut, qui n'a fait qu'un acte d'hypocrisie, en feignant de se soumettre au Saint Siége.*"

It is right to observe here that this "principal ground of condemnation" of the institute, viz., that it had passed a resolution which established the principle of religious toleration, was entirely new, does not appear in any former document, and further, it would seem, could not have been known by *Guibord*.

It should also be mentioned, in order to complete the necessary history of the case, that *Guibord*, about six years before his death, being dangerously ill, was attended by a priest, who administered unction to him, but refused to administer the Holy Communion unless he resigned his membership of the institute, which *Guibord* declined to do.

Guibord having died, as has been stated, on the 18th of November, 1869, suddenly of an attack of paralysis, on the 20th of November the widow caused a request to be made on her behalf to the *curé* and to the clerk of the *fabrique*, to bury *Guibord* in the cemetery, and tendered the usual fees.

Previously to this application M. *Rousselot*, the *curé*, having heard of the death of *Guibord*, and knowing that he was a member of the institute, had applied to the administrator of the diocese for his directions. He replied that he had yesterday received a letter from the Bishop of *Montreal*, directing him to refuse absolution "*même à l'article de la mort*," to members of the institute; he could not, therefore, permit "*la sépulture ecclésiastique*" to *Guibord*. The *curé*, having received this letter, refused to bury *Guibord* in the larger part of the cemetery, where Roman Catholics were ordinarily buried, but offered to allow him interment in the other part, without the performance of any religious rites.

It seems that the agent of the widow offered to accept burial in the larger part without religious services; but this offer was rejected.

On the 23rd of November the widow presented a petition to the

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Superior Court setting out the facts, and prayed that a mandamus might issue as above stated.

On the 24th one of the Judges of the Superior Court ordered a writ of mandamus to issue; but it must be observed that the writ issued was a writ of summons calling upon the Defendants to appear and answer the demand which should be made against them by the Plaintiff for the causes mentioned in the said petition thereto annexed. The proceeding was in substance the same as a rule to shew cause why a writ of mandamus should not be issued. The Defendants appeared and filed a petition praying that the writ might be annulled for irregularity, upon the ground that it was a writ of summons and not a writ of mandamus, and also upon other technical objections. The Defendants, at the same time, filed a traverse of the Plaintiff's petition and three pleas. The first plea was to the same effect as the petition of the Defendants, and set up the same alleged grounds of irregularity, and pointed out the same defects as those mentioned in that petition.

The second plea in substance denied that the Respondents had refused to bury the deceased, and alleged that they were entitled to point out the place in the cemetery where he should be buried, and that they were ready to do so, and to give him such burial as he was entitled to.

The third plea averred that the service (*culte*) of the Roman Catholic religion in *Canada* is free, and the exercise of its religious ceremonies of whatever nature is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognises the Respondents as proprietors of the Roman Catholic parish church of *Montreal*, and of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the Respondents, and of the superior Roman Catholic ecclesiastical authority; that the Respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that, besides their above-men-

tioned capacity the Respondents are also civil officers within certain limits, having to fulfil certain duties defined by law, and are legally responsible in that capacity and sphere only; that the Respondents, in their double capacity thus existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of *Montreal,* and are responsible to the religious and civil authorities respectively for the religious and civil portions of such functions; that the Respondents for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief who are buried with Roman Catholic religious ceremonies, and another part for the burial of those who are deprived of ecclesiastical burial; that *Joseph Guibord* was a member of a literary society at *Montreal,* called the *Canadian Institute,* and as such was at the time of his death, and had been for about ten years previous, notoriously and publicly subject to canonical penalties resulting from such membership and involving deprivation of ecclesiastical burial; that immediately after the death of *Joseph Guibord,* the Rev. *Victor Rousselot,* Roman Catholic priest, and curate of the parish of *Montreal,* submitted the question of his religious burial to the Rev. *Alexis Frédéric Truteau,* Vicar-General of the Roman Catholic diocese of *Montreal,* and administrator of the diocese, with supreme ecclesiastical authority therein, in the absence of the bishop, by virtue of the rescript of the Pope, dated the 4th of October, 1868; and that the said administrator replied by a decree declaring that, since *Joseph Guibord* was a member of the *Canadian Institute* at the time of his death, ecclesiastical burial could not be granted to him; that the Plaintiff, by her agents, having required M. *Rousselot* and the Respondents to give to the body both religious and civil burial in the cemetery in question they repeatedly informed the said agents of such decree of the administrator of the diocese, and that in consequence thereof ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the Plaintiff or her

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agents, and that, having regard to the above facts, the Plaintiff could not claim from the Respondents for the remains of her late husband more than civil burial, and that under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the Respondents had never refused. The plea then concluded by saying that the Respondents had refused nothing but ecclesiastical burial, for the refusal of which they were responsible only before the religious and not before the civil authority.

The widow filed several answers to these pleas, some in the nature of demurrers, some of traverses of the facts alleged, and to the third plea also a special answer, setting out the facts with respect to the dispute between the institute, the bishop, and the Court of *Rome*,—which have been already mentioned.

The Respondents joined issue on these answers, and also, by leave of the Court, filed a special replication to the Petitioner's third answer to the Respondent's third plea; in which, after repeating that the Civil Courts were incompetent to question a decision of the ecclesiastical authorities on ecclesiastical matters, and could not inquire into the grounds upon which ecclesiastical burial had been refused to *Guibord*, they, nevertheless, cited the decrees of the Council of *Trent* with regard to the Index and the proceedings relating to the institute, and concluded by an averment that, in consequence of the premises, *Guibord* at the time of his death must be considered as "*un pécheur public*," and, as such, obnoxious to the canonical penalties imposed by the Roman Catholic ritual, among which was privation of sepulture.

That the members of the institute having refused to obey the pastoral, and persisted in their refusal, "*le jugement de l'Évêque imposant la peine canonique sus-mentionnée est demeurée en pleine force et effet.*"

It then avers, after stating the proceeding relating to an appeal to *Rome*, that the Administrator-General, taking into consideration all the facts relating to *Guibord*, "*comme membre du dit institut*," had "*justement rendu le décret qui l'a privé de la sépulture ecclésiastique*;" and further, "*que ce décret, rendu dans la forme où il se trouve, est d'ailleurs un décret nominal.*"

Issue was joined on this special replication.

It is to be noticed that in this replication it is for the first time

alleged that, on the ground of his being "*pécheur public*," *Guibord* was disentitled to ecclesiastical burial.

The case was argued before Mr. Justice *Mondelet* in the Superior Court, on the demurrers and on the merits.

The Court gave judgment for the widow on the merits, and on the demurrers to the first and third pleas, and ordered a peremptory writ of mandamus to issue; but declared that it did not pay any regard either to the widow's special answer to the third plea or the special replication, which it seems to have considered as improperly pleaded.

There was an appeal to the Court of Revision, before three Judges, who reversed the judgment of the Court below, quashed the writ originally issued, and dismissed the writ of mandamus with costs.

From this judgment the widow appealed to the Court of Queen's Bench, and presented petitions of recusation against four of the Judges which the Judges refused to admit. It is unnecessary to enter upon this part of the case, as in the course of the argument their Lordships fully expressed their opinion that these petitions could not be sustained.

The Court of Queen's Bench affirmed the judgment of the Court of Revision; but the Judges did not agree as to the grounds upon which their decision was founded. They discussed at some length the matters raised upon the third plea; but they decided against the Appellant upon the questions as to the form of the writ and the regularity of the proceedings.

The questions of form, which are not unimportant, may be disposed of before the graver questions which arise out of the third plea are considered.

And first, is the mandamus bad upon the ground of uncertainty, or upon any other ground?

Their Lordships are of opinion that the writ was in proper form according to the *Code of Procedure for Lower Canada;* the procedure therein pointed out, though called a mandamus, was not a writ of mandamus in the first instance, but, in effect, a summons to answer a petition praying for an order upon the Defendants to do certain specified acts. The first thing to be done by the Defendants was not, as in the case of a writ of mandamus in *England*,

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to make a return to the writ, but to appear to the summons, and plead to the petition. The sections of the *Code of Procedure* bearing upon this point are 1023, 1024, and 1025. Article 1023 evidently contemplates a writ of summons. It says the application is made by petition, supported by affidavits setting forth the facts of the case presented to the Court or a Judge, who may thereupon order the writ to issue, clearly meaning a writ of summons, for it goes on, "and such writ is served in the same manner as any other writ of summons." This is rendered more clear by Article 1024, which directs the subsequent proceedings to be had in accordance with the provisions of the first chapter of that section. That refers to Articles from 997 to 1002, both inclusive; which, in cases similar to *quo warranto*, require an information to be presented to the Court or a Judge, supported by affidavits, upon which the issue of a writ of summons may be ordered. The writ of summons commands appearance upon a day fixed, and is to be served in the manner pointed out. The Defendants are to appear on the day fixed (Article 1011), and to plead specially to the information (Article 1012). In the case of mandamus under the Code, therefore, the parties are not to make a return to the summons; the pleadings are to commence with a plea to the petition, and not a plea to the return to the writ. In our opinion, therefore, the objection to the writ, so far as it related to its being a mere writ of summons, and not a writ of mandamus, was untenable, and the practice of the Court in this respect, which has always been adopted, is in compliance with the directions of the Code. The other technical objections to the writ have no substantial foundation. Three of the Judges of the Court of Queen's Bench held that the writ was correct in point of form, although one of them, Mr. Justice *Badgley*, being of opinion that the writ asked for too much, held that a peremptory writ could not issue commanding the Defendants to do the one thing only, viz., to bury, which, according to his view, they were legally bound to do. The procedure therefore requiring a petition and plea to the petition, it appears to follow that the applicant for the writ is not so strictly bound by the prayer of his petition as he is in this country to the command contained in the first writ of mandamus, and that the Court may mould the order for the peremptory writ

in the same manner as the Court here may mould the rule for a mandamus. There being no rule which requires a peremptory writ of mandamus to be granted in the precise terms of the first writ, it seems to follow that the general rules applicable to pleadings, either in equity or at common law, may be acted upon. According to them, a Plaintiff may generally obtain a decree for less than that for which he asks, and for relief in a more distinct and specific form than that for which he has prayed, provided it is within the scope of the prayer.

In the present case the prayer of the petition was—that the Defendants might be commanded to bury or cause to be buried the body of the deceased *Joseph Guibord* in the Roman Catholic cemetery, conformably to usage and to law. That was, doubtless, as pointed out by the Court of Review, extremely vague.

The objection to issuing a peremptory writ in that form was clearly stated by Mr. Justice *Mackay*.

"Under such vague conclusion," he observes, "the point really meant to be tried is hidden. That the Defendants are bound to bury *Guibord* in the Roman Catholic cemetery, according to the usages and the law, is indisputable, and is not disputed. Peremptory mandamus to do this would nevertheless leave things just as unsettled between Plaintiff and Defendants as they were the day before the Plaintiff presented the *requête*."

But if the principle above laid down be acted upon, the Court may, in a peremptory writ, specify distinctly what they consider the Defendants are bound to do according to usage and law, and may peremptorily command the Defendants to do it. If they consider that the Defendants are bound to provide ecclesiastical burial with the rites and ceremonies of the Roman Catholic Church, they may say so. If they consider that the Defendants are bound to bury the body in that part of the cemetery in which bodies of those interred with ecclesiastical burial are usually buried, the peremptory writ may be worded accordingly. If they think the Defendants are bound to register the burial, the writ may go on to order such registration; or, if they think that the Defendants are not bound to register the burial, they can order the burial alone.

The next point of form relates to the question who are the

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Defendants to this writ. Are they the *curé* and *marguilliers* personally, or in their corporate capacity? The name used in the conveyance of the land for the cemetery, and that used in the plaint and writ of summons are identical. And their Lordships upon the whole are clearly of opinion that the writ was against "*les curé et marguilliers,*" for the time being, in their corporate capacity as holders of the land and administrators of the cemetery; and that the *curé* in his individual or spiritual capacity is not a party to this suit.

It now becomes necessary to determine the merits of the case, and the grave questions of public and constitutional law which are raised by the third plea, and the subsequent pleadings.

In order to do this, it is desirable to consider shortly the *status* of the Roman Catholic Church in *Lower Canada*, both before and after the cession of the Province of *Quebec* in 1762.

It is certain that before the cession the Established Church of that province, as in the Kingdom of *France* itself, was the Roman Catholic Church; its law, however, being modified by what were known as "*les libertés de l'Église Gallicane.*" There seem also to have been regular Ecclesiastical Courts, and besides them there was vested in the Superior Council of *Canada* the jurisdiction recognised in French jurisprudence and enforced by the Parliaments of *France* as the "*appellatio tanquam ab abusu,*" or the "*appel comme d'abus.*"

In *Dupin's* "*Manuel du Droit Public Ecclésiastique Français,*" ed. 1845, the celebrated work of *Pithou* is set forth, with notes of the learned editor, in the 79th Article. *Pithou's* treatise defines the "*appel comme d'abus*" as that—

"*Appellation précise que nos pères ont dit estre quand il y a entreprise de jurisdiction ou attentat contre les saincts décrets et canons receux en ce royaume, droits, franchises, libertez, et priviléges de l'Église Gallicane, concordats, édits, et ordonnances du Roy, arrests de son Parlement: bref, contre ce qui est nonseulement de droict commun, divin ou naturel, mais aussi des prerogatives de ce royaume et de l'Église d'iceluy.*"

The following are the public documents which shew how the Roman Catholic Church in *Lower Canada* was dealt with on the conquest and cession of the province:—

The 27th Article of the Instrument of Cession is in these terms:—

"*Le libre exercice de la religion Catholique Apostolique et Romaine subsistera en son entier, en sorte que tous les états et le peuple des villes et des campagnes, lieux et postes éloignés, pourront continuer de s'assembler dans les églises et de fréquenter les sacrements comme ci-devant, sans être inquiétés d'aucune manière, directement ou indirectement. Ces peuples seront obligés par le Gouvernement Anglais à payer aux prêtres qui en prendront soin les dîmes et tous les droits qu'ils avaient coutume de payer sous le Gouvernement de Sa Majesté Très-Chrétienne. Accordée pour le libre exercice de leur religion l'obligation de payer les dîmes aux prêtres dépendra de la volonté du Roi.*"—(Page 15, "*Actes Publics.*")

Again, in the Treaty of 1763 it is said:—

"*Sa Majesté Britannique consent d'accorder la liberté de la religion Catholique aux habitans du Canada, et leur permet de professer le culte de leur religion, autant que les lois de l'Angleterre le permettent.*"

And lastly, by an Act of Parliament passed in 1774 (14 Geo. 3, c. 83), intituled, "An Act for making more Effectual Provision for the Government of *Quebec*, in *North America*," it was declared by sect. 5 that, for the more perfect security and ease of the minds of the inhabitants of the said province His Majesty's subjects professing the religion of the Church of *Rome* of and in the said province of *Quebec* might have, hold, and enjoy the free exercise of the religion of the Church of *Rome*, subject to the King's supremacy, declared and established by an Act made in the first year of the reign of Her Majesty Queen *Elizabeth*, over all the dominions and countries which then did, or should thereafter belong to the Imperial Crown of this realm, and that the clergy of the said church might hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as should profess the said religion.

And by the 8th section it is enacted:—

"That all His Majesty's Canadian subjects within the province of *Quebec*, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together

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with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of *Great Britain;* and that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of *Canada* as the rule for the decision of the same," &c.

From these documents it would follow that, although the Roman Catholic Church in *Canada* may on the conquest have ceased to be an Established Church in the full sense of the term, it nevertheless, continued to be a Church recognised by the State; retaining its endowments, and continuing to have certain rights (*e.g.*, the perception of "*dîmes*" from its members) enforceable at law.

It has been contended on behalf of the Appellants that the effect of the Act of Cession, the Treaty, and subsequent legislation, has been to leave the law of the Roman Catholic Church as it existed and was in force before the cession, to secure to the Roman Catholic inhabitants of *Lower Canada* all the privileges which their fathers, as French subjects, then enjoyed under the head of the liberties of the Gallican Church; and further, that the Court of Queen's Bench, created in 1794, possessed, and that the existing Superior Court now possesses, as the Superior Council heretofore possessed, the power of enforcing these privileges by proceedings in the nature of *appel comme d'abus.* Considering the altered circumstances of the Roman Catholic Church in *Canada,* the non-existence of any recognised Ecclesiastical Courts in that province, such as those in *France* which it was the office of an *appel comme d'abus* to control and keep within their jurisdiction; and the absence of any mention in the recent *Code of Procedure for Lower Canada* of such a proceeding, their Lordships would feel considerable difficulty in affirming the latter of the above propositions. Mr. Justice *Mondelet,* indeed, refers in his judgment to various cases of a mixed character (1) in which the

(1) *Wurtele* v. *Bishop of Quebec,* *Déc. des Tribunaux,* tom. ii. p. 68; *Jarret* v. *Sénécal,* 4 Low. Can. Jur. 213; *Larocque et vir* v. *Michon,* 1 Low. Can. Jur. 181.

Civil Courts appear at first sight to have recently exercised a jurisdiction somewhat analogous to that exercised in the *appel comme d'abus*. But on examination these cases prove to be suits of a different character, actions for damages against spiritual persons for wrongs done by them in their spiritual capacities.

Their Lordships do not, however, think it necessary to express any opinion as to the competence of the Civil Courts to entertain a suit in the nature of the *appel comme d'abus*, as they agree with Mr. Justice *Mackay* and other Judges of the Court of Revision, that in such a suit the procedure must be different from the present, and that at least it would be necessary to bring the proper ecclesiastical authorities before the Court as Defendants.

It is another and a different question, to be considered hereafter, whether the jurisprudence and precedents relating to the *appel comme d'abus* may not be considered by their Lordships as evidencing the law of the Church in *Canada*, by the maladministration of which the Appellant complains that he has been wronged.

Nor do their Lordships think it necessary to pronounce any opinion upon the difficult questions which were raised in the argument before them touching the precise *status*, at the present time, of the Roman Catholic Church in *Canada*. It has, on the one hand, undoubtedly, since the cession, wanted some of the characteristics of an Established Church; whilst, on the other hand, it differs materially in several important particulars from such voluntary religious societies as the Anglican Church in the Colonies, or the Roman Catholic Church in *England*. The payment of *dîmes* to the clergy of the Roman Catholic Church by its lay members; and the rateability of the latter to the maintenance of parochial cemeteries, are secured by law and statutes. These rights of the Church must beget corresponding obligations, and it is obvious that this state of things may give rise to questions between the laity and clergy which can only be determined by the Municipal Courts. It seems, however, to their Lordships to be unnecessary to pursue this question, because even if this Church were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the

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society has been injured as to his rights, in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of *Long* v. *Bishop of Cape Town*, their Lordships said:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who, expressly or by implication, have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice" (1).

Their Lordships will bear in mind these principles in the judgment which they are about to pronounce.

Now, what is the question to be here decided? It is the right of *Guibord* to interment in the ordinary way in the cemetery of his parish, a right enforceable by his representative. It may be observed that the *curé* and *marguilliers* are only proprietors of the parochial cemetery in the sense in which a parson in *England* is the owner of the freehold of the churchyard, that is to say, subject to the right of the parishioner to be buried therein. The Respondents do not contest that *Guibord* had that right, but say that they have refused nothing but ecclesiastical burial, for the refusal of which they are responsible only to the religious, and not to the civil authority. They admit, however, that the consequence of the refusal of ecclesiastical burial is that the remains of the deceased can be interred only in the smaller or reserved portion of the

(1) 1 Moore, P.C. (N.S.) Cases, 461. 9 Jur. N.S. 809

cemetery. It cannot be doubted on the evidence that this qualification of the general right of interment, this separation of the grave from the ordinary place of sepulture, implies degradation, not to say infamy.

That forfeiture of the right to ecclesiastical burial, involving these consequences, may be legally incurred is not denied by the Appellants. Their contention is, that it was not so incurred by *Guibord;* that, according to the law of the religious community to which he belonged, he retained at the time of his death his right to be buried in the larger portion of the cemetery in the usual manner.

Their Lordships are disposed to concur, with one qualification, in the opinion expressed by Mr. Justice *Berthelot* as to the mixed character of these questions. He says:—

"*Le baptême, le mariage et la sépulture sont de matière mixte, et les ecclésiastiques ne peuvent se refuser de les administrer à ceux de leur paroissiens qui y ont droit, comme résidants dans l'enclave de sa paroisse, à moins cependant qu'il n'y ait des peines ecclésiastiques prononcées contre eux par l'évêque ou autre autorité ecclésiastique compétente.*"

If this passage is to be taken to imply that it is competent to the bishop to deprive a Roman Catholic subject of his rights by pronouncing against him *ex mero motu* ecclesiastical penalties, their Lordships are of opinion that the proposition is too wide. They conceive that, if the act be questioned in a Court of Justice, that Court has a right to inquire, and is bound to inquire, whether that act was in accordance with the law and rules of discipline of the Roman Catholic Church which obtain in *Lower Canada*, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by an authority competent to pronounce it.

It is worthy of observation, as bearing both upon the question of the *status* of the Roman Catholic Church in *Lower Canada*, and the manner of ascertaining the law by which it is governed, that in the Courts below it was ruled, apparently at the instance of the Respondents, that the law, including the ritual of the Church,

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could not be proved by witnesses, but that the Courts were bound to take judicial notice of its provisions.

The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in *Lower Canada* is identical with that which governed the French province of *Quebec*. If modifications of that law had been introduced since the cession they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract binding the members of that religious community, and, as such, ought, if invoked in a Civil Court, to be regularly proved.

It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the *Quebec* Ritual, which was certainly accepted as law in *Canada* before the cession of the province, and does not differ in any material particular from the Roman ritual also cited in the Courts below. The *Quebec* Ritual is as follows:—

"*On doit refuser la sépulture ecclésiastique,*—1°, *aux Juifs, aux infidèles, aux hérétiques, aux apostats, aux schismatiques, et enfin à tous ceux qui ne font pas profession de la religion Catholique.* 2° *Aux enfants morts sans baptême.* 3° *A ceux qui auraient été nommément excommuniés ou interdits, si ce n'est qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique, après que la censure aura été levée par nos ordres.* 4° *A ceux qui se seraient tués par colère ou par désespoir, s'ils n'ont donné avant leur mort des marques de contrition; il n'en est pas de même de ceux qui se seraient tués par frénésie ou accident, auxquels cas on la doit accorder.* 5° *A ceux qui ont été tués en duel, quand même ils auraient donné des marques de repentir avant leur mort.* 6° *A ceux qui, sans excuse légitime, n'auront pas satisfait à leur devoir pascal, à moins qu'ils n'ayent donné des marques de contrition.* 7° *A ceux qui sont morts notoirement coupables de quelque péché mortel, comme si un fidèle avait refusé de se confesser, et de recevoir les autres sacrements avant que de mourir, s'il était mort sans vouloir pardonner à ses ennemis, s'il avait été assez impie pour blasphémer sciemment et volontairement sans avoir donné aucun signe de pénitence. Il ne faudrait pas user de la même rigueur envers celui qui aurait blasphémé par folie ou par la violence*

du mal, car en ce cas les blasphèmes ne seraient pas volontaires, ni par conséquent des péchés. 8° *Aux pécheurs publics qui seraient morts dans l'impénitence; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc. A l'égard de ceux dont les crimes seraient secrets, comme on ne leur refuse pas les sacrements, on ne doit pas aussi leur refuser la sépulture ecclésiastique. Pour ce qui est des criminels qui auront été condamnés à mort et exécutés par ordre de la justice, s'ils sont morts pénitens, on peut leur accorder la sépulture ecclésiastique, mais sans cérémonie. Le curé ou vicaire y assiste sans surplis, et disent les prières à voix basse. Quand il y aura quelque doute sur ces sortes de choses, les curés nous consulteront ou nos grands vicaires.*"

The refusal of ecclesiastical burial to *Guibord* is not justified, and could not have justified by either the 1st, 2nd, 4th, 5th, or 7th of the above rules.

To bring him within the 3rd rule it would be necessary to shew that he was excommunicated by name. That such a sentence of excommunication might be passed against a Roman Catholic in *Canada*, and that it might be the duty of the Civil Courts to respect and give effect to it their Lordships do not deny. It is no doubt true, as has already been observed, that there are now in *Canada* no regular Ecclesiastical Courts, such as existed and were recognised by the State when the province formed part of the dominions of *France*. It must, however, be remembered that a bishop is always a *judex ordinarius*, according to the canon law; and, according to the general canon law, may hold a Court and deliver judgment if he has not appointed an official to act for him. And it must further be remembered that, unless such sentences were recognised, there would exist no means of determining amongst the Roman Catholics of *Canada* the many questions touching faith and discipline which, upon the admitted canons of their Church, may arise among them. There is, however, no proof that any sentence of excommunication was ever passed against *Guibord nominatim* by the bishop or any other ecclesiastical authority. Indeed, it was admitted at the Bar that there was none; their Lordships are therefore relieved from the necessity of considering how far such a sentence, if passed, might have been

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examinable by the Temporal Court, when a question touching its legal effect and validity was brought before that Court.

It should be borne in mind that an issue was distinctly raised by the pleadings upon the fact of such a sentence; and the necessity of such a sentence to justify the refusal seems to be, to some extent, admitted by the allegation in the Defendant's pleading that *le décret*, as it is there called, of the Administrator-General, was *un décret nominal.*

In the course of the argument it was suggested, rather than argued, that the refusal of ecclesiastical burial in *Guibord's* case might be brought within the 6th of the above rules, and justified on the ground that, without legitimate reason, he had failed to communicate at Easter. But upon this their Lordships have to observe that this failure was not the ground on which ecclesiastical burial was denied to him; and that, so far from wilfully abstaining from receiving the sacraments of the Church, those sacraments were refused to him when he desired to receive them simply because he continued to be a member of the institute.

The cause of refusal finally insisted upon was that *Guibord* was "*un pécheur public*" within the meaning of the 8th rule.

This defence was set up for the first time in the replication.

The Administrator-General's evidence on the point should be noticed:—

"Question.—*Pour quelle raison feu Joseph Guibord, comme membre de l'Institut Canadien, ne pouvait-il pas être admis aux sacrements de l'Église?*

"Réponse.—*Parce que, comme tel, il est considéré comme pécheur public. On entend par pécheur public celui qui, pour une raison connue publiquement, ne peut participer aux sacrements de l'Église. M. Joseph Guibord, en appartenant à l'Institut Canadien, appartenait à un Institut qui se trouvait, comme il se trouve encore, sous les censures de l'Église par la raison qu'il possède une bibliothèque contenant des livres défendus par l'Église sous peine d'excommunication,* latæ sententiæ *encourue* ipso facto, *et réservée au Pape, par le fait de la possession des dits livres. Cette espèce d'excommunication s'encourt par le fait même, dès que l'on connaît la loi de l'Église qui en défend la lecture et la retenue, dès que cela parvient à la connaissance de ceux qui les possèdent. Cette excommunication a atteint M. Gui-*

bord par le fait même qu'il était membre de l'Institut. Lorsqu'on est sous l'effet de la dite excommunication, quoique l'on puisse continuer à être membre de l'Église Catholique, et que, de fait, l'on continue à en être membre, l'on est privé de la participation aux sacrements, ce qui entraîne la privation de la sépulture ecclésiastique. Voilà pourquoi cette espèce de sépulture a été refusée à M. Guibord."

The evidence continues—

"Question.—*Le dit feu Joseph Guibord, comme membre de l'Institut Canadien, était-il sous l'effet de l'excommunication, en vertu de quelque règle générale de l'Église seulement, ou en conséquence de quelque décret particulier?*

"Réponse.—*Il y était d'abord en vertu de la loi générale de l'Église, et en vertu de l'application qu'en a faite l'Évêque de Montréal par son mandement.*"

The evidence further continues—

"Question.—*A quel mandement faites-vous allusion?*

"Réponse.—*C'est à celui produit en cette cause comme l'Exhibit B. de la Demanderesse.*

"Question.—*Est-il déclaré quelque part dans aucun mandement ou lettre pastorale émanant de l'Évêque de Montréal que le fait d'appartenir à l'Institut Canadien entraîne l'excommunication; et si vous répondez affirmativement, veuillez indiquer les termes qui décrètent telle chose?*

"Réponse.—*Ceci est déclaré dans l'annonce de Monseigneur de Montréal, que, en ma qualité d'administrateur, j'ai fait publier le quatorze Août mil huit cent soixante-et-neuf, laquelle annonce est produite comme pièce D. de la Demanderesse. Voici dans quels termes ceci est déclaré: 'Ainsi, nos très-chers frères, deux choses sont ici spécialement et strictement défendues, savoir:* 1, *de faire partie de l'Institut Canadien tant qu'il enseignera des doctrines pernicieuses; et* 2, *de publier, retenir, garder, lire l'*Annuaire *du dit Institut pour* 1868. *Ces deux commandements de l'Église sont en matière grave, et il y a par conséquent un grand péché à les violer sciemment. En conséquence celui qui persiste à vouloir demeurer dans le dit Institut, ou à lire ou seulement garder le sus-dit* Annuaire, *sans y être autorisé par l'Église, se prive lui-même des sacrements, même à l'article de la mort, parce que, pour être digne d'en approcher,*

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il faut détester le péché, qui donne la mort à l'âme, et être disposé à ne plus le commettre.'

"Question.—*Être privé des sacrements et être excommunié, est-ce la même chose?*

"Réponse.—*Dans le cas présent c'est la même chose.*

"Question.—*L'excommunication, peut-elle être prononcée sans qu'il soit même fait usage du mot?*

"Réponse.—*Je ne suis pas prêt à répondre à cette question.*"

It is impossible wholly to avoid a suspicion that it had originally been intended to rely on an *ipso facto* excommunication, and that this subsequent defence of "*pécheur public*" was resorted to when it became manifest that a sentence of excommunication was necessary, and that none had been pronounced.

What is this category of "*pécheur public*" to include? Is the category capable of indefinite extension by means of the use of an *et cætera* in the *Quebec* Ritual? Or if the force of an *et cætera* is to be allowed to bring a man within the category of persons liable to what in ecclesiastical law is a criminal penalty, must it not be confined to offences *ejusdem generis* as those specified? *Guibord's* case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "*quand il y aura quelque doute sur ces sortes de chose les curés nous consulteront ou notre grand vicaire;*" but their Lordships are of opinion that these words can at most imply a duty on the part of the *curé* to consult the ordinary as to the application of the law in doubtful cases, not a power on the part of the ordinary to enlarge the law in giving those directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of, the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cætera* might be, according to the supposed exigency of the particular case, expanded so as to include within its bann any person being in habits of intimacy or conversing with a member of a literary society containing a prohibited book; any person visiting a friend who possessed such a book; any person sending his son to a school in the library of which there was such a book; going to a shop

where such books were sold; and many other instances might be added. Moreover, the Index, which already forbids *Grotius, Pascal, Pothier, Thuanus,* and *Sismondi,* might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of *Rome;* and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual would not have been deemed to be within the authority of the bishop by the law of the Gallican Church as it existed in *Canada* before the cession; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point is, that the fact of being a member of this institute does not bring a man within the category of a public sinner to whom Christian burial can be legally refused.

It would further appear that, according to the ecclesiastical law of *France,* a personal sentence was in most cases required in order to constitute to constitute a man a public sinner.

Jean de Pontas (Article 2, *des Cas de Conscience, vo. Sépulture,* A.D. 1715), says:—

"*Un homme en France n'est point censé pécheur public, et ne peut être traité comme tel, à moins qu'il n'y ait une sentence déclaratoire rendue par le jugement ecclésiastique, contre le coupable.*

"*A propos d'un concubinaire public, pendant près de dix ans mort endurci dans le crime, sans avoir voulu se confesser, Pontas décide que 'le curé doit enterrer cet homme en observant toutes les formalités pratiquées par l'Église, sans pouvoir ni s'absenter, ni feindre de refuser la sépulture ecclésiastique, sous prétexte d'intimider les autres pécheurs semblables, ni enfin ordonner à un autre prêtre de l'enterrer sans observer les cérémonies ordinaires.'*"

Durand de Maillane (*Droit Canonique,* t. 5, p. 442) says:

"*On ne reconnaît pour véritables excommuniés à fuir, que les Païens et les Juifs, ou les hérétiques condamnés et séparés ainsi totalement du corps des fidèles. Les autres coupables de différents*

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crimes qu'ils n'expient point avant leur mort ne sont privés de la sépulture que lorsqu'ils sont dénoncés excommuniés, ou que leur impénitence finale est tellement notoire qu'on ne peut absolument s'en déguiser la connaissance. Le moindre doute tire le défunt hors du cas de privation, parce que chacun est présumé penser à son salut.

"*Suivant les maximes du royaume, on ne prive de la sépulture ecclésiastique que les hérétiques séparés de la communion de l'Eglise, et les excommuniés dénoncés. La notoriété sur cette matière n'est pas absolument requise, parce qu'il y a des cas où il est très-nécessaire de faire respecter à cet égard les saintes lois de l'Église; mais elle n'est pas aisément reçue, à cause des inconvénients qui pourraient en résulter; car le refus de la sépulture est regardé parmi nous comme une telle injure, ou même comme un tel crime, que chaque fidèle, pour l'honneur de la religion, et la mémoire ou même le bien de son frère en Jésus-Christ, est recevable à s'en plaindre. Cette plainte se porte devant des juges séculiers, parce qu'elle intéresse en quelque sorte le bon ordre dans la société, et l'honneur même de ses membres.*"

Héricourt (*Lois Ecclésiastiques*, p. 174):—

"*Avant de dénoncer excommunié celui qui a encouru une excommunication* lata sententia, *il faut le citer devant le juge ecclésiastique, afin de justifier le crime qui a donné lieu à la censure, et d'examiner s'il n'y aurait pas quelque moyen de défense légitime à proposer.*"

No personal sentence, such as is contemplated by these authorities, was, as already pointed out, ever passed against *Guibord*.

It is also to be borne in mind that no sentence, whatever might have been its value, was passed even after *Guibord's* death. There is indeed a letter called a *décret* of the Administrator-General to the *curé*, which, after referring to a letter of the bishop, written before *Guibord's* death, refuses ecclesiastical sepulture to him as a member of the institute. The representatives of *Guibord* were neither summoned nor heard. This so-called *décret* had none of the essential elements of a judicial sentence.

It remains for their Lordships to consider what is the substantive law upon which the Respondents rely in support of their contention that *Guibord* is to be considered a public sinner within the terms of the *Quebec* Ritual.

They appear to place their principal reliance on Rule X. of the Council of *Trent*:—

"*Omnibus fidelibus præcipitur ne quis audeat contra harum regularum præscriptum, aut hujus Indicis prohibitionem libros aliquos legere aut habere.*

"*Quod si quis libros hæreticorum vel cujusvis auctoris scripta ob heresim vel ob falsi dogmatis suspicionem damnata, atque prohibita legerit vel habuerit, statim in excommunicationis sententiam incurrat.*"

Various observations arise on this citation, which seem to deprive it of all authority in the present case.

In the first place it is a matter almost of common knowledge, certainly of historical and legal fact, that the decrees of this Council, both those that relate to discipline and to faith, were never admitted in *France* to have effect *proprio vigore*, though a great portion of them has been incorporated into French *Ordonnances*. In the second place, *France* has never acknowledged nor received, but has expressly repudiated, the decrees of the Congregation of the Index.

Gibert, in his Institutes, says that the *ipso facto* excommunication inflicted by the Council of *Trent* as the punishment of reading or possessing prohibited books would have no effect in *France dans le for extérieur*. *Dupin*, a jurist already mentioned, denies the authority in *France* of the decrees of the Congregation. He says:—

"*En effet, en consultant les précédents, on trouve un célèbre arrêt du Parlement de Paris qui l'a jugé ainsi en* 1647, *après un éloquent plaidoyer de l'Avocat-Général Omer Talon*:—

"'Nous ne reconnoissons point en France,' *dit ce magistrat*, '*l'autorité, la puissance, ni la juridiction des congrégations qui se tiennent à Rome; le Pape peut les établir comme bon lui semble dans ses États;* mais les décrets de ces congrégations n'ont point d'autorité ni d'exécution dans le royaume . . . *Il est vrai que dans ces congrégations se censurent les livres défendus, et dans icelles se fait* l'index expurgatorius, *lequel s'augmente tous les ans; et c'est là où autrefois ont été censurés les arrêts de cette cour rendus contre Chastel, les œuvres de M. le Président de Thou, les libertés de l'Église*

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Gallicane, et les autres livres qui concernent la conservation de la personne de nos rois et l'exercice de la justice royale,'" &c. (Dupin, Droit Public Ecclésiastique, avertissement sur la 4me édition.)

No evidence has been produced before their Lordships to establish the very grave proposition that Her Majesty's Roman Catholic subjects in *Lower Canada* have consented, since the cession, to be bound by such a rule as it is now sought to enforce, which, in truth, involves the recognition of the authority of the Inquisition, an authority never admitted but always repudiated by the old law of *France*. It is not, therefore, necessary to inquire whether since the passing of the 14 Geo. 3, c. 83, which incorporates (s. 5) the 1 Eliz., already mentioned, the Roman Catholic subjects of the Queen could or could not legally consent to be bound by such a rule.

The conclusion, therefore, to which their Lordships have come upon this difficult and important case is that the Respondents have failed to shew that *Guibord* was at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the *Quebec* Ritual, or any law binding upon Roman Catholics in *Canada*, justify the denial of ecclesiastical sepulture to his remains.

It is, however, suggested that the denial took place, in fact, by the order of the bishop or his vicar-general; that the Respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their Lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence that an inferior officer can justify his act or omission by the order of his superior only when that order has been regularly issued by competent authority.

The argument would, in fact, amount to this: that even if it were clearly established that *Guibord* was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the bishop would be sufficient to justify the *curé* and "*marguilliers*" in refusing to bury him in that part of the parochial cemetery in which he ought on this hypothesis to be interred; or, in other words, the bishop, by his own absolute power in any individual case, might dispense with the application

of the general ecclesiastical law, and prohibit upon any grounds, revealed or not revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their Lordships that the Roman Catholics of *Lower Canada* have consented to be placed in such a condition.

Their Lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would or would not have had power to order the interment of *Guibord* to be accompanied by the usual religious rites, because the widow finally forewent this demand, and Counsel at their Lordship's bar have not asked for it, and also because the *curé* is not before them in his individual capacity; but they will humbly advise Her Majesty that the decrees of the Court of Queen's Bench and of the Court of Review be reversed. That the original decree of the Superior Court be varied, and that, instead of the order made by that Court, it should be ordered that a peremptory writ of mandamus be issued, directed to "*Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal,*" commanding them, upon application being made to them by or on behalf of the *Institut Canadien*, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics, who receive ecclesiastical burial, are usually interred, for the burial of the remains of the said *Joseph Guibord;* and that, upon such remains being brought to the said cemetery for that purpose at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there. And that the Defendants do pay to the *Canadian Institute* all the costs of the widow in all the lower Courts, and of this appeal, except such costs as were occasioned by the plea of *recusatio judicis*, which should be borne by the Appellants.

Their Lordships cannot conclude their judgment without expressing their regret that any conflict should have arisen between the ecclesiastical members of the Roman Catholic Church in *Montreal*, and the lay members belonging to the *Canadian Institute.*

It has been their Lordships' duty to determine the questions submitted to them in accordance with what has appeared to them to be the law of the Roman Catholic Church in *Lower Canada.*

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If, as was suggested, difficulties should arise by reason of an interment without religious ceremonies in the part of the ground to which the mandamus applies, it will be in the power of the ecclesiastical authorities to obviate them by permitting the performance of such ceremonies as are sufficient for that purpose, and their Lordships hope that the question of burial, with such ceremonies, will be reconsidered by them, and further litigation avoided.

Solicitors for the Appellant: Messrs. *Few & Co.*
Solicitors for the Respondents: Messrs. *Ashurst, Morris & Co.*

J. C.* 1874 *June* 5, 23.

JOHN NELSON ABBOTT . . . . . APPELLANT;

AND

ROBERT ABBOTT . . . . . RESPONDENT.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Land held by British Subjects in Turkey—Validity of Order by Consular Court of Constantinople for the Sale of Lands in Turkey held by British Subjects in the Name of a Turkish Subject.

Previously to the protocol of June, 1867, permitting British subjects to hold land in *Turkey* in their own names, they were permitted only to hold land in the name of some female relative, or of some native subject of the Ottoman Empire. Two partners who owned some land before 1868 had not availed themselves of the protocol, but continued to hold the land in the name of a subject of the Sultan. A suit was instituted by one of the partners in the Supreme Consular Court of *Constantinople* for the dissolution of the partnership and for taking the accounts. An order was made in the suit that the receiver should sell the land by auction:—

Held, that the order was not *ultra vires* of the Court.

THIS was a consolidated appeal from two several judgments and orders of Her Britannic Majesty's Supreme Consular Court at *Constantinople*, respectively pronounced on the 11th and 13th days of October, 1871, in a suit in which the Respondent was Plaintiff and the Appellant was Defendant.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The Appellant and Respondent for many years traded at *Salonica* and elsewhere in partnership under the name of "*Abbott Brothers,*" and the suit was instituted to obtain a dissolution of the partnership, and an account of the assets, debts, and liabilities of the firm, and of what was due to the Appellant and to the Respondent respectively.

In the suit the Court ordered that an account should be taken of the assets of the firm, and subsequently, among other orders, made an order on the 13th of October, 1871, that the receiver of the partnership estate should sell by auction certain lands in *Turkey* belonging to the estate, subject to such conditions of sale as should be imposed by the Court. The order gave the parties to the suit leave to attend the auction and to bid.

The lands were held by the partners in the name of a subject of the Sultan, in accordance with the Turkish law previous to the protocol of July, 1868. By this protocol foreigners were allowed to hold lands in *Turkey* in their own names; but the partners had not taken advantage of this provision. In the appeal before the Privy Council the chief question raised was as to whether the order for the sale of the lands was valid.

Mr. *Garth*, Q.C., Mr. *J. C. McCoan*, and Mr. *Wm. Graham*, for the Appellant:—

Before the protocol of 1868 no foreigners had the right of holding property in *Turkey;* but the disability was evaded by a fiction of the Turkish law, which allowed houses or land to be held either in the Christian name of the proprietor's wife, sister, or other female relation, who for fiscal and other purposes was regarded as a Rayah (non-Mussulman) subject of the Sultan; or in the name of some native, either Mussulman or Christian, called a *prête-nom*, who was registered as the legal owner, but who gave a private written acknowledgment to the foreigners that the property belonged in fact to the latter. Property held under either of these tenures is exclusively subject to the jurisdiction of the Ottoman tribunals. The Consular Court has no right to exercise any authority whatever over such property. Consequently the order of the Consular Court for the sale of the partnership pro-

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perty was *ultra vires*. Moreover, the order was ruinous to the partnership estate; for one of the consequences of the order was that the property was sold for very much less than its real value.

Sir *John B. Karslake*, Q.C., Mr. *C. P. Butt*, Q.C., and Mr. *Lumley Smith*, for the Respondent.

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Their Lordships having reserved their judgment, it was now delivered by

SIR MONTAGUE E. SMITH :—

[After determining the question as to the account, his Lordship proceeded :—]

It has been contended, lastly, that the order of the 13th of October, 1871, directing the receiver to sell the partnership premises by public auction is invalid and *ultra vires* of the Court.

It appears that, before the protocol of the 18th of June, 1867, British subjects could not hold real property in *Turkey* in their own names, but, nevertheless, were permitted to hold it in the name of some female relative, who was regarded by the Ottoman law as a Rayah (non-Mussulman) subject of the Sultan, or of some native subject (called a "*prête-nom*"), who was registered as the legal owner, but who gave a private memorandum acknowledging the real ownership, an acknowledgment acted upon by the Courts in the event of his fraud or bankruptcy. By the protocol of the 18th of June, 1867, British subjects were permitted to hold land in their own names. This, however, was declared to have for its legal effect (among other things) :—

"To render them directly amenable to the Ottoman Civil Courts in regard to all questions relative to landed property and to all real actions, both as Plaintiffs and Defendants, even when both parties are foreign subjects, the whole under the same footing, the same conditions, and in the same forms as Ottoman proprietors, and without the power of availing themselves, in such matters, of their personal nationality; but under the reservation of the immunities attaching to their persons and their personal property, according to the terms of the Treaties."

The partners had not availed themselves of this protocol, but continued under the old practice to hold the partnership premises in the name of a subject of the Sultan.

This being so, it appears to their Lordships that the effect of the order is no more than to direct the receiver, who united in himself the rights of the respective partners, to sell all the beneficial interest the partners had in the partnership premises. In the event of the purchaser experiencing any difficulty in obtaining possession, the Court would have power, by further orders, to compel the partners to carry into effect the sale, and to complete the title of the purchaser by all the means at their disposal. It was strongly pressed upon their Lordships that the result of the order was to cause the property to be sold at an undervalue. If this be true, that result is due, partly, to the manner in which the property was held; but still more to the conduct of the Appellant. The Consular Court did its utmost to secure the full value by inviting tenders from the partners, and giving to each the liberty to bid. Their Lordships are not satisfied that in the circumstances it would have been possible to dispose of these assets of the partnership to better advantage by any other mode of sale. Entertaining this view, their Lordships are of opinion that the order was right and proper.

Their Lordships will therefore humbly advise Her Majesty to affirm the orders appealed against, and to dismiss the appeal with costs.

Solicitor for the Appellant: Mr. *W. A. Plunkett.*
Solicitors for the Respondent: Messrs. *Maynard & Son.*

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THE PROVINCIAL INSURANCE COMPANY OF CANADA . . . . . } APPELLANTS;

AND

JOEL LEDUC . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF UPPER CANADA (APPEAL SIDE).

Marine Insurance—Policy—Breach of Warranty—Abandonment of Ship—Constructive Acceptance of Notice of Abandonment—Acceptance of Notice makes a Liability as for Total Loss—It also prevents Insurers from relying on a Breach of Warranty—Agent.

If notice of the abandonment of a ship is given by the insured to the insurers, and the insurers then say and do nothing, the conclusion is that they do not mean to accept the abandonment. But if they by their agent take possession of the ship, and then repair it and retain it in their possession for some time without repudiating the notice or informing the insured as to the character in which they are acting, then there is a constructive acceptance of the abandonment by the insurers. And a constructive acceptance produces the same effect on the rights of the parties as an express acceptance.

Where the agent who took possession of the ship, &c., was instructed to look after the interests of the insurance company; his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, having been such as to be evidence from which an acceptance might be inferred, the company was bound by his acts.

After the acceptance by the insurers of the abandonment of a ship they become liable as for a total loss.

Where a ship-policy contained a provision that the ship should not be within the *Gulf of St. Lawrence* within a prescribed period, and the ship went into the gulf within the prohibited time and was wrecked; and notice was given of an abandonment, and was accepted by the insurers; it was contended by them that the ship was not insured when she was lost, as the insurance did not extend to a loss in the gulf within the prohibited time, and that an abandonment can be of no avail where there is no insurance. However, it was

Held, that the vessel was in fact insured, and that the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties; and if, after a constructive total loss and notice of abandonment, the insurers, with full knowledge of all the facts, accept the notice, they cannot, when called on to pay the amount insured, resile and

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* *Present*:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

rely on a breach of warranty. By the voluntary acceptance of the notice of abandonment, an agreement is entered into which closes the whole matter.

An agent who insures for another with his authority may sue for the sum assured in his own name.

Interpretation of a clause in a marine policy as to a prohibition of the ship from being in the *Gulf of St. Lawrence* within a prescribed period.

THIS was an appeal from two concurrent judgments of the Court of Queen's Bench for the Province of *Quebec*, of the 22nd of March, 1872; one of which modified on appeal a judgment of the superior Court for the Province of *Quebec* of the 31st of March, 1870, in favour of the Respondent, by increasing the sum for which judgment was given for the Respondent, and condemning the Appellants to pay the full amount claimed and costs; and the other of which dismissed with costs the appeal of the Appellants.

The judgments were given on an action brought by the Respondent against the Appellants on a policy of assurance for $5000, which had been effected on a ship called the *Babineau and Gaudry*. The Respondent was a merchant of *Montreal;* the Appellants were an insurance company carrying on business at *Toronto* and having agents at *Montreal* and other places in *Canada*.

The ship had been sold to the Respondent and one *Benjamin Vigneau*, in March, 1866, for £1400, and had then been and still remained registered in their joint names. *Vigneau* was unable to provide his moiety of the purchase-money, and the whole was accordingly paid by the Respondent. *Vigneau* had now died, but his brother stated that *Vigneau* had told him that he was indebted to the Respondent, and that, to give him security for what he owed him, he had authorized the Respondent to insure the vessel in his own name; so that if the vessel perished the Respondent might receive the amount assured, and so pay himself the debt.

On the 3rd of January, 1867, the Respondent insured the ship with the Appellants for $5000. The policy was, as far as is material, in these terms:—

"*J. Leduc*, of *Montreal*, province of *Quebec*, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance and cause to be insured, lost or not lost, the sum of $5000 upon the body, tackle, apparel,

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and other furniture of the good schooner *Babineau and Gaudry*, whereof is master for the present voyage *Benjamin Vigneau*, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel or the master thereof is or shall be called.

"Beginning the adventures upon the said vessel, tackle, apparel, &c., at and from *Montreal*, to trade between the *Island of Newfoundland, Nova Scotia, West India Islands, Cuba*, safe ports in the *United States*, and *Quebec*, and *Montreal*, to and from ports in the the Lower Provinces; risk commencing at noon on the 15th of December, 1866, and ending at noon on the 15th of December, 1867.

"And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at any port or places if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured are valued at $7000.

"And it is agreed that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value shall be her valuation in this policy; and if not valued herein, then her actual value at the time of the inception of this risk at the port to which she then belonged.

"Not allowed under this policy to enter the *Gulf of St. Lawrence* before the 25th day of April, nor to be in the said *Gulf* after the 15th day of November. Nor to proceed to *Newfoundland* after the 1st day of December or before the 15th day of March, without payment of additional premium and leave first obtained; war risk and sealing voyages excepted."

At the time of the insurance the ship was at the *Port of St. John, Newfoundland*, preparing for a voyage to the *West Indies*, which she subsequently completed. On the 16th of November, 1867, the day after the date fixed by the policy as the last day on which the ship was to be in the *Gulf of St. Lawrence*, the *Babineau and Gaudry* sailed from *Montreal* on a voyage to the *Port of St. John, Newfoundland;* and on or about the 1st of December, 1867, while still in the *Gulf of St. Lawrence*, she was overtaken by a violent storm and totally lost on the *Island of Anticosti*. The whole of the crew were drowned, and news of the wreck did not reach the

Respondent until the 18th of May, 1868. On the following day he served on the Appellants' agent at *Montreal*, Mr. *Cuaig*, a notarial protest, which contained a claim for payment of the full sum insured, $5000, and also a formal abandonment of the wreck to the insurance company.

The protest was as follows:—

"At the special instance of *Joel Leduc* . . . . I, the undersigned notary public . . . . went to the *Montreal* office of the *Provincial Insurance Company of Canada*, and made the following declarations by way of notification . . . . to the said insurance company, speaking to Mr. *McCuaig*, agent of the company: that the schooner *Babineau and Gaudry*, belonging to the said *Joel Leduc*, insured against the perils and dangers of navigation at the said *Provincial Insurance Company of Canada, Montreal* branch, for the sum of $5000 currency, under policy bearing date No. 28,964, and date as countersigned at *Toronto, Ontario*, the 3rd day of January, 1867, being tight, staunch, and strong, well and sufficiently manned, provided, equipped, and furnished with all things needful and necessary for her voyage, loaded with a general cargo of flour, peas, apples, and others, left the port of *Montreal*, in the province of *Quebec*, on the 16th day of November, 1867, for the port of *St. John, Newfoundland*. That the said *Joel Leduc* received information from *Bénoit Vigneau*, the captain of the said schooner, *Babineau and Gaudry*, by his letter dated *Bic*, the 27th of November, 1867, that all was right and well on board said schooner; that since that date the said *Joel Leduc* heard nothing of and concerning said schooner up to yesterday the 18th instant, when he was told by Captain *Édouard Vigneau*, that he, the said *Vigneau*, had seen one named *Mathurin*, the second on board the steamer *Gaspé*, who stated to him that the said schooner, *Babineau and Gaudry*, had become a total wreck: that he had gone himself and been on the wreck about twenty miles below the west point of *Anticosti Island*, in the gulf, and was told that the crew was all lost; that a schooner or steamer had been sent to the wreck, had taken and saved about 700 barrels of flour, which had been transported to and sold at *Gaspé*, the rest of the cargo being lost, or perhaps could be found there yet. That it is supposed that the said accident and wreck of the said schooner *Babineau and Gaudry* happened

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and took place on or about and between the 1st and 5th day of December last past 1867; that the said *Joel Leduc* is ready and prepared to affirm upon oath all and every of the above facts. Under these circumstances, and from the information received by the said *Joel Leduc*, of the wreck of said schooner *Babineau and Gaudry*, and the general report since few days by the newspapers of this province of said wreck, and that two bodies of the crew had been found:

"I, the said undersigned notary, did and do hereby at the request aforesaid, notify and declare unto the said *Provincial Insurance Company of Canada* that the said *Joel Leduc* claims and demands through my ministry of and from the said *Provincial Insurance Company* the payment of the said sum of $5000, being the amount of insurance of said schooner *Babineau and Gaudry* under said policy of insurance; and that the said *Joel Leduc* did and do hereby relinquish unto the said *Provincial Insurance Company*, and abandon from this day henceforth and for ever, all and every the rights, claims, titles, and interest which he may or can have, demand, or pretend into and upon the said schooner *Babineau and Gaudry*, so wrecked as above stated; to all which the said *J. F. McCuaig* answered, 'I will submit it to the company,' which answer I, the said undersigned notary, have written and taken to serve and avail as occasion shall or may require. Protesting for all I can protest in the premises, and to the end that the said *Provincial Insurance Company* may not have cause to pretend and plead ignorance in the premises, I, the said notary, have served said insurance company with an authenticated copy of these presents for notification thereof. This done and notified at the place, and on the day, month, and year first above and before written under the number twelve thousand."

Mr. *Craig* forwarded the protest to the head office at *Toronto*, but there was some conflict of evidence as to whether it was received at once, or not till the 18th of June.

In the middle of May, Mr. *Macgregor*, the company's marine inspector, received instructions to proceed to *Anticosti* to look after the interests of the company. Mr. *Macgregor* stated in his evidence:—

"I went to the vessel, which I found about twenty miles from

the lighthouse, near the centre of the island, on the south-west side. She was lying bottom up, with her bow out in the gulf, and her rigging, anchor, and chains were lying just at her bow; there was a hole cut in her side for the purpose of taking her cargo out. I also found parts of the bodies of the men of the crew, and I am under the impression that all the men of the crew perished. From the appearance of the bodies and bones remaining, I have no doubt that they must have been drowned there. After ascertaining the state of the facts, I went back to *Gaspé*, and on my arrival I found the balance of what had been found on the cargo arrived there, sent by other persons on vessels chartered by *Lloyd's* agent for the purpose. I immediately advertised the sale of the goods saved for the benefit of the parties concerned; and I had this sale proceeded with as soon as possible, and the proceeds, after paying the expenses, were given to different parties having an interest, and the balance now lies in the hands of the company. After disposing of the cargo I got material and men, and went back to the island and took the vessel off, and brought her to *Gaspé*, where I left her and went home. After I got to *Toronto*, I endeavoured to get the salvage. When I found I could not, I went down in September and brought her up to *Montreal*, where she has since been sold. I do not know what price she brought. The expenses for salvage amounted to about $3000."

The Appellants proceeded against the ship in the Court of Admiralty at *Quebec* for the salvage expenses, which exceeded the value of the ship; and they obtained a decree awarding to them as salvors, $3300; the ship was sold by order of the Court of Admiralty, for $350, which the Appellants then received.

Mr. *Macgregor*, the company's inspector, had no authority to accept a notice of abandonment; and the head office had no opportunity of communicating with him after he went to *Anticosti* until his return.

The Respondent claimed $5000 on the policy; but the Appellants refused to pay the sum, and thereupon the action was commenced on the 14th of November, 1868, for the recovery of the amount.

The Appellants demurred to the declaration, on the ground that the policy contained a warranty that the ship should not be in the

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Gulf of St. Lawrence after the 15th of November, and should not proceed to *Newfoundland* after the 1st of December; whereas the declaration shewed that the ship was lost while in the *Gulf of St. Lawrence*, after the 15th of November, and while proceeding to *Newfoundland*, after the 1st of December.

On the 31st of March, 1870, the Court gave judgment for $3500 (being the value of one-half of the ship, as stated in the policy), together with interest and costs, on the ground that the Appellants having accepted the notice of abandonment were estopped from setting up the alleged breach of warranty, and that the Respondent was entitled to recover only the value of his interest in the ship.

From this judgment both the Appellants and the Respondents appealed to the Court of Queen's Bench for the Province of *Quebec;* which gave judgment in favour of the Respondent, ordering the Appellants to pay the Respondent the whole sum of $5000, and interest and costs. *Duval*, C.J., *Caron*, J., and *Drummond*, J., concurred in this judgment; but *Badgley*, J., dissented therefrom, and *Monk*, J., dissented only as to part of the sum claimed.

The following were the Articles of the *Civil Code of Lower Canada*, that were referred to:—

"Art. 2521. Loss for which the insurer is liable, is either total or partial.

"Art. 2522. Total loss may be either absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when, by reason of any event insured against, the thing though not wholly destroyed, or lost, becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. Before the insured can claim for a constructive total loss, he must make an abandonment, as declared in the following section.

"Art. 2538. The insured may make an abandonment to the insurer of the thing insured, in all cases of its constructive loss, and may thereupon recover as for a total loss. Without abandonment he is entitled in such cases to recover as for a partial loss only.

"Art. 2543. The abandonment is made by a notice given by

the insured to the insurer of the loss, and that he abandons to the latter all his interest in the thing insured.

"Art. 2544. The notice of abandonment must be explicit, and must contain a statement of the grounds of abandonment. These grounds must exist and be sufficient at the time of the notice.

"Art. 2545. Abandonment on the ground of the ship being disabled by stranding, cannot be made if she can be raised and put in a condition to continue her voyage to the place of destination. In such case, the insured has his recourse against the insurer for the expense and loss occasioned by the stranding.

Art. 2547. Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied.

Art. 2548. On an accepted abandonment of the ship, the freight earned after the loss belongs to the insurer of the ship; that earned previously to the loss belongs to the shipowner or to the insurer on freight, to whom it is abandoned.

Art. 2549. Abandonment made upon sufficient ground and accepted, is binding on both parties. It cannot be defeated by any subsequent event, or revoked otherwise than by mutual consent.

Sir *John Karslake*, Q.C., and Mr. *Bompas*, for the Appellants:—

It is quite clear from the terms of the policy that the ship was precluded from being in the *Gulf of St Lawrence* at the time of the year when she was wrecked. Thus we are not liable for the loss. But then it is said that notice of the abandonment of the ship was sent to us, and that we accepted the abandonment. The notice was not received at the company's chief office at *Toronto* until the 18th of June, 1868, before which time we had sent off Mr. *MeGregor* with instructions to look after any interest we might have in the cargo and in the ship. When through him we took possession of the ship and repaired it, we were acting merely as salvors. We never accepted the abandonment. We certainly never did so expressly, and it cannot be said that we did enough to accept it constructively. Moreover, it was only by the head office and by some writing that abandonment could be accepted.

Even if there were an acceptance of the abandonment, the ship was not insured at the time when she was lost, for the

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insurance did not extend to a loss in the *Gulf of St. Lawrence* after the 15th of November, and an abandonment can be of no avail when there is no insurance.

The declaration ought to contain a direct allegation that the risk was covered by the policy; but this of course it could not do, as the risk was not covered.

The Plaintiff had an insurable interest only to the extent of one-half of the ship. He is accordingly entitled at the utmost to one-half only of the insurance money: *Irving* v. *Richardson* (1); *Ebsworth* v. *Alliance Marine Insurance Company* (2).

Mr. *Alfred Wills*, Q.C., and Mr. *Pauli*, for the Respondent:—

There was no breach of the conditions of the policy. It was within the meaning of the policy for the ship to be in the *Gulf of St. Lawrence* after the 15th of November, if she were on her voyage from *Montreal* to *Newfoundland* before the 1st of December. The clause with reference to being in the gulf, means that the ship was not to be in the gulf proceeding westwards after the 15th of November. It did not apply to a ship going eastwards towards *Newfoundland;* the other clause applied to this: see *Colledge* v. *Harty* (3).

Even if there was a breach of the condition, yet the company accepted the notice of abandonment which was sent to them. After notice has been given, the silence of the insurers is sufficient to shew an acceptance of the abandonment: *Hudson* v. *Harrison* (4). And if it were not so, though the company did not expressly accept, what they did conclusively shews a constructive acceptance. By their agent they took possession of the ship, they repaired it, and retained possession of it until it was arrested at their instance and sold under Admiralty process. They never repudiated the notice of the abandonment, and they never gave any notice of their own object in taking possession of the ship, &c.: *Peele* v. *Mercantile Insurance Company* (5); *Peele* v. *Suffolk Insurance Company* (6); *Cincinnati Insurance Company* v. *Bakewell* (7).

(1) 2 B. & Ad. 193.
(2) Law Rep. 8 C. P. 596.
(3) 6 Ex. 205.
(4) 3 B. & B. 97.
(5) 3 Mason's Reports, 27; Phillips on Insurance, 5th Ed. vol. ii., p. 375.
(6) 7 Pickering's Reports, 254 (Phillips, p. 375).
(7) 4 B. Monroe's Reports (Kentucky) 541.

With regard to the argument that in this case the acceptance of the abandonment cannot avail anything, there was certainly an insurance of the ship for the voyage, and what is alleged is that there was a breach of one of the conditions; after an acceptance of the abandonment the company cannot rely upon a breach of warranty to release them from their liability.

The Plaintiff is entitled to the whole of the insurance money. He had an interest in one-half of the ship: and the owner of the other half, who was indebted to him, had authorized him to insure the ship in his own name, in order that if the ship were lost the Plaintiff might receive the whole of the insurance money, and pay himself the amount of the debt.

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Their Lordships having reserved their judgment, it was now delivered by

SIR BARNES PEACOCK:—

The Respondent, *Joel Leduc*, is the Plaintiff, and the Appellants, the *Provincial Insurance Company of Canada*, are the Defendants in a suit brought in the Superior Court for *Lower Canada*, district of *Montreal*, upon a policy of insurance upon the body, tackle, apparel, and other furniture of the schooner *Babineau and Gaudry*.

The policy was effected by the Plaintiff as well in his own name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, in part or in all, for $5000 upon the said ship, &c., beginning the adventures at and from *Montreal* to trade between the *Island of Newfoundland, Nova Scotia, West India Islands, Cuba*, safe ports in the *United States*, and *Quebec* and *Montreal*, to and from ports in the Lower Provinces, the risk commencing at noon of the 15th of December, 1866, and ending at noon of the 15th of December, 1867. The vessel, &c., were valued at $7000, and it was agreed that, in case a total loss should be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining the value should be her valuation in the said policy. The vessel was warranted free of war risk. The policy contained a stipulation in the following words:—

"Not allowed under this policy to enter the *Gulf of St. Lawrence*

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before the 25th day of April, nor to be in the said gulf after the 15th day of November. Nor to proceed to *Newfoundland* after the 1st day of December or before the 15th day of March, without payment of additional premium and leave first obtained, war risk and sealing voyages excepted."

It may be taken as against the Plaintiff that the vessel left the port of *Montreal* on the 16th of November, 1867, for the port of *St. John, Newfoundland*, and that she was wrecked between the 1st and 5th days of December, 1867, about twenty miles below the west point of the *Island of Anticosti*, in the *Gulf of St. Lawrence*.

It was contended on the part of the Plaintiff that, notwithstanding the vessel was lost in the *Gulf of St. Lawrence* after the 15th of November, 1867, the case did not fall within that part of the warranty or condition by which it was declared that she was not to be in the said gulf after the 15th of November. The argument in support of that contention was, that the words "to proceed to *Newfoundland*," must, according to the decision of *Colledge* v. *Harty* (1), be read in the sense of "to proceed towards," or "to set sail for," *Newfoundland*, and that if read in that sense, it would be inconsistent to allow a vessel to set sail from *Montreal* to *Newfoundland* on or before the 1st of December, and not allow her to enter the *Gulf of St. Lawrence* after the 15th of November. It was, therefore, urged that the first part of the condition by which it was declared that the vessel was not allowed to enter the *Gulf of St. Lawrence* after the 15th of November, applied only to the case of entering the gulf for the purpose of proceeding upwards; and in support of that argument the evidence of *Bazil de Roy* was referred to, in which he stated that it was the custom of navigators to leave the port of *Montreal* at any time in the month of November, for the purpose of going down the gulf, but that for the purpose of going up the river, they did not generally enter the gulf later than the 15th of November, and that the reason was that the ice then began to descend, and the navigation became dangerous.

Mr. *Routh*, a commission merchant, who was the agent of the Defendants at *Montreal*, through whom the policy was effected,

(1) 6 Ex. 205.

stated that he understood by the clause that the vessel was not to be in the gulf after the 15th of November, that is to say, coming west; and going east, not to proceed to *Newfoundland* after the 1st of December, &c. On cross-examination he stated he did not undertake to do anything beyond giving his opinion of the reading of the clause.

Their Lordships are of opinion that the clause is very clear, that the opinion of Mr. *Routh* is not admissible, and that to put upon the clause such a construction as that contended for, would be to make a new agreement for the parties, instead of construing that which they made for themselves.

The only way in which a doubt is created as to the construction of the clause, is by reading the latter part of it, as declaring that the vessel might proceed from any of the ports mentioned in the policy to *Newfoundland*, on or before the 1st of December, notwithstanding they might have to pass through the gulf after the 15th of November. That, however, is not the true construction of the clause. As their Lordships read it, the vessel was neither to be in the *Gulf of St. Lawrence* after the 15th of November, nor to proceed to *Newfoundland* from any port after the 1st of December. There is nothing inconsistent or unreasonable in giving effect to the words used, and in holding that the vessel, whether proceeding from *Montreal*, or from any other port, was not to be in the *Gulf of St. Lawrence* after the 15th of November.

Their Lordships are therefore of opinion that the Appellants are not liable for the loss unless they have rendered themselves liable by accepting the notice of abandonment.

As regards that question, it may be taken as proved that within a reasonable time after the Plaintiff first heard of the loss of the vessel, he gave notice of abandonment to the company's agent at *Montreal*. In the Respondent's case, in the appeal to the Court of Queen's Bench, it is said:—"The Respondent heard of the loss of the vessel on the 19th of May, 1868, and thereupon left the notification and protest with the company's agent at *Montreal*. This document does not appear to have reached the company's head office at *Toronto* until the 19th of June following."

Mr. *McCuaig*, the agent, however, gave evidence to the effect that the notice of abandonment was, to the best of his knowledge,

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served upon him on the 19th of May, 1868, and that the said paper was sent by him to the head office of the company at *Toronto* on the same day or the next day.

Their Lordships see no reason to doubt the truth of that statement. Mr. *Crocker*, who was a director and the manager and agent of the company up to the month of August, 1870, when examined as a witness for the Defendants, declared that the copy of the notice of abandonment was received at the office of the Defendants in *Toronto* on the 18th of June, 1868. On cross-examination, however, he stated that he did not receive a copy of the notice through Mr. *McCuaig*, that he received it from Mr. *McGregor*, who sent it to him from *Quebec*. That copy, if sent by Mr. *McGregor* from *Quebec* must have been a different copy from that sent by Mr. *McCuaig*. Indeed, one of the learned counsel for the Defendants was forced to admit upon the argument that the copy notice sent by Mr. *McGregor* and the notice of which Mr. *McCuaig* spoke, must have been different copies. The protest and notice of abandonment gave notice of the time and place of the wreck, demanded payment of the $5000 for which the vessel was insured, and relinquished and abandoned to the Defendants all the rights, claims, title, and interest of the Plaintiff in the said vessel.

Both the Superior Court and the Court of Queen's Bench on appeal, found that the abandonment was accepted by the Defendants. Two of the learned Judges of the Court of Queen's Bench dissented from the judgment of that Court; Mr. Justice *Monk*, however, dissented only on the question of damages; Mr. Justice *Badgley* alone dissented as to the acceptance by the Defendants of the abandonment. It was proved by *McGregor* that on the 24th of May he was instructed by the manager of the insurance company to proceed to *Gaspé*, in the *Gulf of St. Lawrence*, to look after any interest the company might have in the cargo or in the vessel: he also stated that the Defendants had constantly acted as salvors and saved vessels, and been allowed salvage for such service. But, whether the Defendants had acted as salvors on other occasions or not, the instructions which Mr. *McGregor* received, and upon which he acted, were to look after any interest the company might have in the cargo or in the

vessel. He stated that he went to *Anticosti*, and was there on the 15th of June; that he went to the vessel, which he found about twenty miles from the lighthouse, near the centre of the island, on the south-west side; that she was lying bottom up with her bow out in the gulf, and her rigging, anchor, and chains lying just at her bow; that a hole had been cut in her side for the purpose of taking out her cargo. He further stated, that after disposing of her cargo, he got material and men, and went back to the island and took the vessel off, and brought her to *Gaspé*, where he left her and went home. He said, "After I got to *Toronto* I endeavoured to get the salvage," but he was wholly silent as to the person from whom, and the manner in which, he endeavoured to get it. He proceeded, "When I found I could not get it, I went down in September and brought the vessel up to *Montreal*, where she has since been sold." It was proved that the sale was made after a decree of the Vice-Admiralty Court in a proceeding *in rem* for salvage, and it is stated by Mr. Justice *Badgley* that she was sold under Admiralty process.

The case of *Hudson* v. *Harrison* (1) was cited as an authority to shew that the silence of an insurer has been construed to be an acceptance of an abandonment. It is not necessary to go to that length in this case. Their Lordships consider that Mr. Justice *Story* was correct in stating that an insurer is not bound to signify his acceptance of an abandonment. If he says nothing and does nothing, the proper conclusion is that he does not mean to accept. In the case of *Peele* v. *The Merchants' Insurance Company* (2) it was held by Mr. Justice *Story* that the floating and repairing of a stranded ship by the underwriters, though it was done with the intention of surrendering to the assured, was a constructive acceptance of an abandonment. In the case of *Peele* v. *The Suffolk Insurance Company* (3) the Supreme Court of *Massachusetts* held that, though the underwriters had a right to keep possession of a ship for a reasonable time to repair it, yet that their keeping of it for an unreasonable time for that purpose was a constructive acceptance of the abandonment. It has also been held that, if the

(1) 3 B. & B. 97.

(2) 3 Mason's Reports, 27; Phillips on Insurance, vol. ii. 5th Ed. p. 375.

(3) 7 Pickering's (Mass.) Reports, 254; Phillips on Insurance, vol. ii. 5th Ed. p. 375.

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underwriters take possession of a vessel after an abandonment, and proceed to repair without giving notice of their object, it is an acceptance: *The Cincinnati Insurance Company* v. *Bakewell* (1).

In the present case the Defendants were not merely silent, but they were active, and by their agent, Mr. *McGregor*, took possession of the vessel after notice of abandonment had been sent to the head office at *Toronto;* and the vessel was kept in the possession of the Defendants from the time it was raised and taken into *Gaspé* until it was arrested at the instance of the Defendants by the Vice-Admiralty Court, and it must have been repaired before it was taken to *Montreal.*

Mr. *McGregor* stated, in his evidence, that he left the vessel at *Gaspé* when he returned to *Toronto;* but there can be no doubt that it was left in the charge of some person on behalf of the company from that time until the month of September following, when he returned to *Gaspé* and took the vessel up to *Montreal;* and, at all events, the vessel having been raised and taken into *Gaspé* by the agent of the Defendants, must be assumed to have remained in their possession until proved to have been delivered over. There is no evidence that the Plaintiff, at any time during that period, had notice of the object with which the Defendants took and retained possession of the vessel, or that they disputed their liability for the loss upon the ground of a breach of warranty, or that they repudiated the notice of abandonment. There was nothing to lead the Plaintiff to suppose that the Defendants repudiated altogether their liability under the policy and the notice of abandonment, and that they were acting, not as insurers, but as mere ordinary salvors, who had no interest whatever in the vessel, and their Lordships cannot believe that they acted merely in that capacity. The remarks of the Court in the case above cited of *The Cincinnati Insurance Company* v. *Bakewell* (1) are very applicable to the present as regards that suggestion.

Mr. Justice *Badgley* considered that the decree of the Vice-Admiralty Court in favour of the Defendants proved them to be mere salvors of the vessel. But their Lordships do not concur in that view. That decree is dated the 23rd of April, 1869. It does not appear, nor is it very material, at what time the suit in

(1) 4 B. Monroe's Reports (Kentucky), 541.

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the Vice-Admiralty Court was commenced. It is, however, stated by Mr. Justice *Badgley*, and the fact is probably so, that the vessel was libelled, pending the present action, in the Superior Court. It was, however, a proceeding *in rem*, and not against the Plaintiff personally. It would have been no answer in that proceeding for the Plaintiff to have alleged that he had no interest in the vessel, that by virtue of the insurance, the loss, the abandonment, and the acceptance thereof, the vessel had become the property of the Defendants. If the Defendants thought fit to libel their own vessel for salvage, it was no concern of the Plaintiff's, nor was he bound to appear. He could not have defended that suit without alleging that he had an interest in the vessel, and thereby prejudicing his own action on the policy and his contention that the Defendants had accepted the abandonment.

Mr. *Croker* stated that *McGregor* was never instructed to accept an abandonment, and that abandonments could be accepted only at the head office and by writing; but *McGregor* was instructed to look after the interests of the company, and if his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, amounted to an acceptance, or were evidence from which an acceptance might be inferred, the Defendants are bound by those acts. The question as to whether the abandonment has been constructively accepted is a mixed question of law and fact. Unfortunately we have not the reasons of the majority of the Judges. Their Lordships are of opinion that the acts of the Defendants, by their agent, *McGregor*, in regard to the vessel after notice of abandonment, and especially their repairing the vessel and retaining it in their possession from the time when it was raised up to the time of their libelling it in the Vice-Admiralty Court, without repudiating that notice or informing the Plaintiff as to the character in which they were acting, were evidence of an acceptance of the abandonment. They would not reverse the concurrent decisions of two Courts upon a question of fact except upon the clearest conviction that they were wrong. In the present case they are of opinion that the Courts were correct in finding that the abandonment was accepted. Their Lordships' view upon this part of the case would be the same even if Mr. *McCuaig* had not forwarded

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the notice of abandonment to the head office before the 18th of June.

Then, as to the effect of that acceptance, it was contended that, as there was no loss for which the Defendants were liable, the notice of abandonment was inoperative, and that the acceptance of it could not convert a partial loss for which the Defendants were not liable into a total loss for which they were liable. Articles 2521 and 2522 of the *Civil Code* were referred to, and it was urged that there could be no loss within the meaning of the Code unless it was caused by an event insured against. Mr. Justice *Badgley* was of that opinion, and he considered that at most there was only a partial loss, which could not, under Articles 2544 and 2545, be converted into a total loss by notice of abandonment. That learned Judge said, "implications of acceptance are not favoured, and can have no effect or validity in contravention of the positive fact upheld by Article 2545 of the actual recovery of the stranded vessel." He was also of opinion that the fact of the restoration and recovery of the stranded vessel prevented abandonment at all.

It appears to their Lordships that the learned Judge did not sufficiently advert to the distinction between a mere notice of abandonment and a valid abandonment, or a notice of abandonment which has been accepted.

Their Lordships are of opinion that the present case did not fall within Article 2545, upon which Mr. Justice *Badgley* so much relied. It was not a case of mere stranding. The vessel could not have been raised and put into a condition to continue her voyage to the place of destination. Further, it appears to their Lordships that Article 2545 must be read in conjunction with Articles 2538, 2543, and 2544, and that it does not apply to the case of an abandonment which has been accepted. It puts the case of stranding very much upon the same footing as that upon which it stands under the law of this country. Abandonments made and accepted are treated of in Article 2547. It is there said, "Abandonment made and accepted is equivalent to transfer, and the thing abandoned, with the rights pertaining to it, becomes from the time of abandonment the property of the insurer. The acceptance may be either express or implied."

Article 2549 of the Code was intended to prevent a notice of abandonment when accepted from being defeated by any subsequent event.

The Superior Court held that the Defendants were estopped, by the acceptance, from urging against the Plaintiff objections founded upon the breaches of condition, and awarded the Plaintiff half the amount, viz., $3500, of the declared value of the vessel. The Court of Queen's Bench (Mr. Justice *Badgley* dissenting), held that the allegations set forth by the Plaintiff in his declaration, which included an allegation of acceptance, were fully proved, and that by reason thereof, and of the abandonment *accepted* by the company, the Plaintiff was entitled to recover the full amount insured, viz., $5000. Mr. Justice *Monk* dissented on the question of amount only. He considered that the Plaintiff was entitled to recover but only one-half of the amount insured.

Their Lordships are of opinion that by the acceptance of the abandonment, the Defendants became liable as for a total loss. In *Smith* v. *Robertson* (1) it was held that the insurers could not be allowed to say that the loss was not total after they had acquiesced in the abandonment as for a total loss, and had thereby admitted that the loss was a loss of that description. In that case the insurer had no right to abandon, but merely a right to give notice of abandonment. But the moment the notice was accepted, the abandonment took effect; the loss immediately became tantamount to a total loss; and the insurers were precluded from relying upon the subsequent recovery of the property, because they were not allowed to say that the loss was not total. This case, as it appears to their Lordships, gets rid of the objection of Mr. Justice *Badgley* to the form of the Plaintiff's declaration. He says:—

"Now the only loss alleged in the declaration is that '*le dit navire aurait péri corps et biens dans le Golfe Saint-Laurent, faisant un naufrage entier et complet,*' which is the absolute total loss of the Code article, where the thing insured is wholly destroyed and lost, in other words, submerged in the *Gulf of St. Lawrence.* As matter of fact, the alleged total loss is not true, and has been disapproved, but it is the only one alleged, and the insurers cannot

(1) 2 Dow. 474.

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be made to suffer from any other description of loss or cause of action than that charged; and in strict justice the Appellant's action should be dismissed, unless, under the rule of practice, he should elect to amend his declaration to meet the proof of the case, which as it is admits of no effective abandonment with its alleged acceptance as set out in the declaration."

Their Lordships would deeply regret if an objection to the mere form of the declaration, which does not affect the merits of the case, should compel them to decide against the Plaintiff, but they are relieved from that difficulty by the above-mentioned case in the House of Lords, in which it was held that the insurers after acceptance could not be allowed to say that the loss was not total.

It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the *Gulf of St. Lawrence* after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed. In the case of the *Cincinnati Insurance Company* v. *Bakewell* (1), the insurance was merely against a total loss. But it was held that the insurers could not, after acceptance of an abandonment, rely upon the fact that the loss was not total, and, consequently, that it was a loss within the terms of the policy.

There is no distinction in principle between an express and a constructive acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Suppose the Defendants, upon the receipt of the notice, had written to the Plaintiff, and said that, as the loss took place in the *Gulf of St. Lawrence* after the 15th of November, they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry that Mr. *Routh*, their agent at *Montreal*, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the *Gulf of St. Lawrence* after the 15th of November applied merely to the case of its going west, and that, under those circumstances, they did not consider it right to avail themselves

(1) 4 B. Monroe's Reports (Kentucky), 541.

of the breach of warranty; that they accepted the abandonment and would make the best they could for themselves of the salvage, and would settle as for a total loss. Or suppose they had gone further and stated that they concurred with Mr. *Routh* in his construction of the policy, and that they accepted the abandonment. Suppose that, after they had raised the vessel they had sold her for $10,000 in excess of the salvage expenses, it is clear that the Plaintiff could not have turned round and claimed the full amount of the proceeds of the vessel upon the ground that the loss was not caused by a risk insured against, and that he had, consequently, no right to give notice of the abandonment. If the Plaintiff could not have treated the abandonment as a nullity, surely the Defendants cannot be allowed, after acceptance, to rely upon a breach of the warranty or condition of which they had full notice at the time of their acceptance of the abandonment. Estoppels are mutual. If the mouth of one party is closed, so also is that of the other. By the abandonment and the acceptance of the abandonment, the matter was closed. The whole interest of the Plaintiff in the thing abandoned was transferred to the Defendants, and became their property (Article 2547).

There are many cases in which it may be very doubtful whether, in point of law, the particular facts amount to a breach of warranty. But if, after a constructive total loss and notice of abandonment, the insurer, with full knowledge of all the facts, accepts the notice of abandonment, he cannot, when called upon to pay the amount insured, resile and rely upon a breach of warranty.

The effect of acceptance is, as remarked by Mr. *Arnould*, well expressed by *Boulay Paty* (1)—"*Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé*" (2).

The only remaining question is as to the amount to which the Plaintiff is entitled. *Jean Baptiste Vigneau* proved that his brother, *Benjamin Vigneau*, who was the captain of the vessel and was lost in her, told him that he was in debt to the Plaintiff, that he had given him a guarantee for the debt, and had authorized him to insure the vessel *Babineau and Gaudry* in his own name, to the end that if the vessel should be lost the Plaintiff might receive

(1) Cours de Droit, Comm., tit. xi., sec. 7, vol. iv. p. 380.

(2) Arnould on Marine Insurance, 4th ed. p. 859, note.

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the whole of the insurance money, and pay himself the amount which *Benjamin Vigneau* owed him.

Their Lordships consider that this declaration of the deceased against his own interest was evidence sufficient to prove that the Plaintiff was authorized by *Benjamin Vigneau* to insure the half of the vessel which belonged to him, and to receive the amount insured. This, coupled with the interest which the Plaintiff had in the other half of the vessel, entitled him to insure the whole vessel, and to recover the full amount insured.

Mr. Justice *Badgley* appears to have overlooked the evidence of *Jean Baptiste Vigneau*, when he stated that his interest in the insurance money did not exceed one-half share thereof. It is clear that an agent who insures for another with his authority may sue in his own name (1). The mortgage did not affect the Plaintiff's right to insure for the full amount of the value of the vessel. The vessel, or the value of it, may be the only means which he has of paying the mortgage debt.

Their Lordships are of opinion that the judgment of the Court of Queen's Bench was correct, and they will humbly advise Her Majesty to affirm it, with the costs of this appeal.

Solicitors for the Appellants: Messrs. *Bischoff, Bompas, & Bischoff.*

Solicitor for the Respondents: Mr. *W. H. Ashurst.*

(1) Phillips on Insurance.

HENRY JOHN STYRING KING . . . . . PLAINTIFF; J. C.*

AND 1875

ALFRED PINSONEAULT . . . . . DEFENDANT. *Jan.* 29, 30; *Feb.* 3, 4, 5; *March* 2.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR QUEBEC (APPEAL SIDE).

Res judicata—"Transaction"—Specific Performance—Powers of Avoué.

On the 31st of December, 1839, certain uncollected rents belonging to the estate of a deceased person were sold by his executors to the Respondent. In 1869, the Appellant, claiming as residuary legatee under the will of the deceased, sued the Respondent and the surviving executor to cancel the sale and for an account and payment, and after certain abortive negotiations for a compromise, foreclosed the pleadings in the action. Thereupon a "transaction" was, on the 4th of June, 1870, made between the Respondent and *L.*, the counsel and attorney of the Appellant, to the effect that the cause was stayed on certain terms of payment and the foreclosure removed, "*jusqu'à nouvel avis*;" which "transaction," on the 10th of June, the Respondent revoked and pleaded to the action. Thereafter the Appellant prayed for judgment in terms of the compromise, which was refused.

In January, 1871, the Appellant brought another action to enforce the compromise, and the Respondent pleaded, first, that the pendency of the original action for substantially the same cause was a bar, or that the discontinuance thereof was a condition precedent to the right to maintain a fresh one; secondly, *res judicata;* thirdly, fourthly, and fifthly, that the "transaction" was conditional on ratification by the Court, was made by *L.* without Appellant's authority, and under mistake, surprise, or fraud:—

Held, first, that the pendency of the first action was not a bar to the institution of the second; nor was the discontinuance of the first a condition precedent to bringing the second. The right mode of enforcing the "transaction" was by a separate action.

Secondly, the "transaction" was intended to be final, but, according to the *Canada Civil Code*, interpreted by the aid of the French law, *L.*, in the absence of special authority, had not, by reason of his being "*avocat*" and "*avoué*," any power to bind his client thereby.

An *avoué* can, however, bind his client (until *désaveu*) by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), dated the 17th of September, 1873,

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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affirming a judgment of the Superior Court for *Lower Canada*, dated the 31st of October, 1871.

The action in which the judgments appealed from were given was instituted in January, 1871, by the Appellant to recover from the Respondent a sum of $30,000 upon a "transaction" or agreement for a compromise dated the 4th of June, 1870, by which, it was contended, another action brought by the Appellant in December 1869, and then pending in the Superior Court of the district of *Montreal* against the Respondent and the Reverend *George Burton Hamilton* (the sole surviving executor and trustee of the will of the late General *Napier Christie Burton*, deceased) had been settled.

The nature of the first action, the circumstances which led thereto, the "transaction" of the 4th of June, 1870, and the manner in which it was effected, the nature of the second suit and the pleadings therein, are fully set forth in the judgment of their Lordships, and need not be repeated here.

The material questions raised by the pleadings in the second action, in which this appeal arose, were (1.) Whether the Appellant was or not put to his election, and bound to discontinue his former action before proceeding with the present one. (2.) Whether, by allowing the Respondent to plead in the former action after the compromise had been entered into, and refusing to give effect to the compromise in that action, the Court had or had not adjudicated upon the validity of the agreement for a compromise, so as to bar any separate action based on that agreement. (3.) Whether the agreement in question was final, or whether it was conditional on the ratification thereof by the Court. (4.) Whether the same was or not void as having been executed on a Sunday. (5.) Whether the attorney of the Appellant had or had not authority to bind him by executing the agreement on his behalf, and whether it was not open to the Respondent to repudiate the contract before it was formally ratified by the Appellant. (6.) Whether there was or not any surprise or deceit practised on the Respondent, or any such error or mistake on his part when he subscribed the agreement, as to entitle him to repudiate.

On the 31st of October, 1871, Mr. Justice *Beaudrey* gave judgment for the Respondent, on the ground that Mr. *Laflamme*, the

counsel and attorney for the Appellant, had no power of attorney for the Appellant, and that the agreement for compromise or "transaction," could not be binding on either party until ratified by the Appellant; and that before it was so ratified the Respondent had withdrawn from it.

The Appellant appealed to the Court of Queen's Bench of *Lower Canada* (Appeal side), and on the 17th of September, 1873, the Court, by a majority of three to two, affirmed the judgment of the Court below, though for different reasons.

The reasons given by Chief Justice *Duval* (who with Mr. Justice *Polette* and Mr. Justice *Badgley*, formed the majority of the Court), for his decision, were to the effect that (without pronouncing any opinion on the validity of the agreement) the object of the agreement was to put an end to a pending suit between the parties, and that the agreement was therefore an incident in that suit, and could not be severed from it so as to be the basis of a separate action so long as the original suit was pending, and that the benefit of the agreement was to be obtained, if at all, by means of subsidiary proceedings in that suit.

Mr. Justice *Polette* (a Judge of the Superior Court, sitting instead of Mr. Justice *Drummond*, who had declared himself incompetent to sit on the appeal), gave no reasons for his judgment, though concurring in the decision. Mr. Justice *Badgley* (who expressed an opinion that the agreement was invalid, and had been obtained illegally and by surprise) also concurred in the decision. The dissentient Judges were Mr. Justice *Monk*, and Mr. Justice *Taschereau*, who held the agreement valid and the action rightly brought.

Mr. *Fry*, Q.C., and Mr. *H. A. Giffard*, for the Appellant:—

As to the preliminary objections taken by the Respondent:—The agreement of the 4th of June, 1870, was a distinct agreement, the validity of which when disputed could not be put in issue and tried upon its merits in the then pending action. The causes of action sought to be enforced in the two actions are different, and a Plaintiff can only be put to elect between two proceedings where the two proceedings are directed to enforce the same cause of action,

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Moreover, the Appellant had done nothing in the first action to render it inequitable that he should maintain the second. From the date of the letter of the 11th of June down to this appeal, the Appellant was always ready and willing to accept the compromise and carry out its terms. He was ready and willing to desist from the first action on payment of the amount mentioned in the "transaction." It was not obligatory upon him to dismiss his bill, or to discontinue his action, which under the Code must be with costs; he must "desist" from it, that is, he must not go on with it. In fact, he has taken no step in it after the compromise, except for the purpose of enforcing the compromise. Besides, the payment of money by the Respondent was a condition precedent to any final order or final stay of proceedings in the first action. Although the Court in that action refused to give effect to the compromise, and allowed the Respondent to plead, that does not render the invalidity of the compromise *res judicata*, nor does it preclude the Appellant from enforcing the same in the second action. The "transaction" was intended as a final settlement of the then pending action. It was not, as contended for by the Respondent, a draft of a judgment to be submitted to the Court, called a "*jugement d'expédient*," from which both parties were entitled to withdraw until it was ratified by the Court. The old French law on that subject has no application. There is nothing in the *Civil Code of Canada* referring to *jugement d'expédient*. This was an ordinary "transaction" and bound the parties: see sect. 1918 of the *Civil Code of Canada*. As to its being executed on a Sunday—— [Mr. *Bompas*:—I do not insist upon that.]

Mr. *Bompas*, and Mr. *Kenelm Digby*, for the Respondent:—

Assuming this "transaction" to be valid, still this action is not maintainable. The two causes of action are mutually exclusive: *Merlin, Question de Droit, vo.* "*Option*," sect. 1, No. 5. Actual discontinuance of the first action was a condition precedent to the right to payment, and to the right to bring a second action. [SIR JAMES W. COLVILE referred to *Dalloz, Juris. Général, vo.* "*Désistement.*"] There is a distinction between actions for specific performance and actions for damages; in the former actual performance of his part by the plaintiff, not merely readiness to perform it, is required:

see *Civil Code of Canada*, sect. 1065: *Perreault* v. *Arcand* (1). The Appellant could at any time have discontinued his suit, and so performed his part of the agreement: see *Code of Civil Procedure*, "On Discontinuance," sect. 450, *et seq.* Here the intention of the parties was that there should be a judgment in terms of the consent. The Code has taken pains to enable Courts to do complete justice in a single suit, and even to provide for the adjudication of claims by and against third parties: 4th chap. of *Civil Procedure Code*, "Incidental Demands," sects. 149–153. The object is to prevent circuity of actions. That being the object of the judgment of the Court below, and the point being one of practice, this Court will not advise its reversal. [Mr. *Fry*, Q.C., referred to sect. 151.] Time was of the essence of the contract.

Mr. *Fry*, Q.C., in reply, referred to *Askew* v. *Wellington* (2) to shew the practice of the Court of Chancery in a matter of this kind.

SIR ROBERT P. COLLIER stated that their Lordships considered that the case should be argued upon its merits.

Mr. *Fry*, Q.C., and Mr. *Giffard*, for the Appellant:—

First, whether Mr. *Laflamme* had authority to bind the Appellant. According to the law of *France* there was a binding contract between the parties, unless the Appellant refused to ratify it; a reasonable time for his ratification must have elapsed before the Respondent could revoke his consent: see *Touillier* [5th ed.], *Droit Civil Français*, vol. vi. p. 33; where you contract with a person who affects to act for another, you must give a reasonable time to the unnamed principal to ratify or not, as he thinks fit. As to Mr. *Laflamme's* authority as *avocat et procureur*, apart from a special mandate, to bind the Appellant, the authority of counsel in this country was discussed in *Swinfen* v. *Swinfen* (3). Whoever has the conduct of a case in Court has authority, *ex necessitate rei*, to bind his client by a compromise within the limits of the suit: *Story* on Agency, p. 20, Art. 24, n.; *Burn's* Eccl. Law, plac. 4,

(1) 4 Low. Can. Jur. 449.
(2) 9 Hare, 65.
(3) 25 L. J. (C.P.) 303 (1856); 26 L. J. (C.P.) 97 (1857).

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131st canon, tit. "Advocate." The *Code Napoléon* restrains the *procureur's* authority: *Dalloz, Général Jurisp.* tit. "*Désaveu;*" sect. 92; *Merlin, Question de Droit, tit.* "*Désaveu,*" "*Désaveu d'avoué.*" See *Canada Code of Civil Procedure,* "Disavowal," sects. 192, 199. As to the necessity for an express authority in writing, see *Civil Code,* Arts. 1233, 1730; *Merlin's Répertoire de Jur.* "*Mandat;*" *Troplong's Droit Civil expliqué,* vol. xvi. "*Du Mandat,*" 101, 102.

Secondly. Was this "transaction" signed under circumstances which prevent the Court from enforcing it. The Respondent had failed to prove that he signed under any surprise, or because of any misrepresentation, or under any error of fact or of law: *Attwood* v. *Small* (1).

For authorities as to the binding effect of this "transaction," see *Canada Civil Code,* sects. 1920, 1921; *Troplong's Droit Civil expliqué,* vol. xvii. p. 651, sect. 135, *tit.* "*Des Transactions.*"

Mr. *Bompas,* and Mr. *Kenelm Digby,* for the Respondent:—

There is no legal evidence of Mr. *Laflamme's* authority to bind his client; the want of it was insisted upon from the first. As to the implied authority of an attorney, it is limited strictly to taking steps in the suit. See *Civil Code,* sect. 1703. See *Guyot's Répertoire de Juris.* vol. xvii. p. 235, *tit.* "*Transaction;*" *Dalloz, Gén. Jur. tit.* "*Transaction*" Art. 4, sect. 57; *Pigeau, Pr. Civ.* vol. i. p. 359. Upon the question of proof of the alleged authority, *Little* v. *McKeon* (2) shews that it is not an approved course in *Canada* to call an attorney as a witness on behalf of his client; so that no inference can be drawn against the Appellant from his advocates not having been called to shew that they were misled. And as a general principle no evidence of the alleged authority is admissible unless it be in writing. See *Pothier's* "*Mandat,*" I. sect. 3, Arts. 29, 30; *Guyot,* "*Mandat,*" p. 233; *Merlin's* Rep. *tit.* "*Mandat;*" *Troplong,* "*Mandat;*" *De Malart* v. *Martin; Dalloz, Jurisp. Gén.* (1860), p. 114.

This "transaction" was not a final contract until confirmed by the Court. It was subject, moreover, to a revocation, and was

(1) 6 Cl. & F. 447; see judgment of Lord *Brougham.*

(2) 3 Rev. de Jur. p. 366.

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revoked by the Respondent before it was so confirmed. Even if *Laflamme* had authority to bind his client, subject to his ratification, still a reasonable time had elapsed during which the Appellant failed to ratify it, and thereupon the Respondent was at liberty to revoke his consent, which he elected to do. See *Pothier, Traité des Oblig.* sect. 801; 1 *Pigeau*, p. 359. As to the invalidity of the transaction, see *Dalloz, Juris. Général, tit.* "*Transactions,*" 155; *Story's* Equity Jurisp. art. 131.

Mr. *Fry*, Q.C., replied. He referred to *Troplong*, "*Mandat,*" sect. 295; *Beaubien, Tr. des Lois Civ. du Bas-Canada*, p. 48; *Pigeau*, vol. i. p. 348; *Trigge* v. *Lavallée* (1); *Troplong*, "*Transactions,*" p. 651; *Lucy's Case* (2).

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The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In order to make this case intelligible a short narrative is necessary. General *Napier Christie Burton*, who possessed property in *England* and in *Lower Canada*, made his will on the 20th of December, 1834, the provisions of which material to the cause are as follows:—He gave and bequeathed the lease of the house in *England*, in which he then resided, and all his household furniture, plate, &c., and all his other effects, together with all cash in the house at the time of his decease, together with all moneys due to to him, in his own right, as well as representative and heir-at-law of his late father General *Gabriel Christie Burton*, to three trustees (*George Burton Hamilton* and *William Henry King*, gentlemen residing in *England*, and *Edmé Henry*, described as of *La Prairie*, near *Montreal, Lower Canada*) in trust for investing the moneys collected and the proceeds of the sale of the furniture, &c., in Government stocks, and accumulating such stocks and dividends, "until," in the words of the will, "*Christiana Harmar*, the only child of my natural daughter, *Mary Harmar*, shall attain the age of twenty-one years, or day of marriage, whichever shall first happen, and then I do direct my said trustees, or the survivors or survivor of them, or the executors of the survivor, to assign and transfer the whole of such accumulated principal fund or stock

(1) 13 Low. Can. Rep. 132. (2) 4 D. M. & G. 356.

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and all dividends thereon, unto the said *Christiana Harmar* for her absolute use and benefit . . . . but in case the said *Christiana Harmar* should die before attaining the age of twenty-one years, or being married, or the transfer of the accumulated stock being made to her, then I do give and bequeath the same unto *Henry John Styring King*, the eldest son of the said *William Henry King*, his executors, administrators, and assigns absolutely for his or their use and benefit," and he directed his trustees to assign the same accordingly.

In a subsequent part of the will he bequeathed the residue of his estate and effects to *Christiana Harmar* absolutely on her attaining the age of twenty-one years, but in the event of her dying under age to *Henry John Styring King*.

By a codicil dated the 23rd of December, 1834, he directed *Edmé Henry* to sell his dwelling-house and land adjoining in *Lower Canada*, to deduct out of the purchase-money all that might be due to *Henry* for the expenses of the sale, and his trouble in collecting the rents of the house and of the real estates and seigniories of the testator in *Canada*, and then to pay over to the other trustees "the balance of such purchase-money, and of all other moneys and rents due to me which have or may come into the hands of the said *Edmé Henry* or his heirs in manner aforesaid, in order that the balance may be invested in Government stock in *England*, upon and for the same trusts and persons to whom I have in the said will bequeathed the rest and residue of my estate and effects."

The testator died in January, 1835.

Christiana Harmar died in April, 1847, at the age of twenty-two years, unmarried.

On the 31st of December, 1839, *Edmé Henry*, the Canadian executor, with the consent of his English co-executors, sold, by deed of that date, to *Pinsoneault*, the Defendant, a relative of his, the uncollected rents of the seigniories of the testator in *Canada* for a sum of £1999.

On the 18th of December, 1869, nearly thirty years after the above-mentioned transaction, *Henry John Styring King* filed a declaration in an action against *Pinsoneault* and *George Burton Hamilton*, the last surviving executor and trustee of the testator,

in which he set out the will without the codicil, averred that *Christiana Harmar* had died under age and unmarried, and before any transfer to her; that *Edmé Henry* had fraudulently concealed from his co-executors the amount of the uncollected rents due to the testator, which amounted to £50,000; that by false representations of *Henry* and *Pinsoneault* the other executors were induced to agree to the sale to *Pinsoneault;* he prayed that the deed of the 31st of December, 1839, should be cancelled, that *Pinsoneault* should account for all the arrears with interest and profits, or in default should pay to him $180,000. On the filing of the declaration a burial certificate was filed with it, wherein it is stated that at the time of her death Miss *Harmar* was aged twenty-two.

This action was brought when the Defendant and his family were in *Europe,* intending to take a lengthened tour. The statement that Miss *Harmar* died under age is admitted by Mr. *Laflamme,* the advocate and attorney of the Plaintiff, to have been false to his knowledge, and inserted in the declaration by him to prevent its being demurrable. If the Plaintiff's right to sue, as it is now contended for, had been stated, viz., that notwithstanding Miss *Harmar* attained her majority, nevertheless the gift over to the Plaintiff took effect because no transfer had actually been made to her, the declaration might have been met by a demurrer, upon the argument of which the Plaintiff's right to sue could have been decided without an *enquête* being necessary if the decision had been against him, and the Defendant's presence in *Canada* might not have been required. It has been suggested that the object of this false statement was to compel the Plaintiff's return to *Canada,* to work on his fears by the prospect of an inquiry into transactions thirty years old, and to drive him to a compromise. Be this as it may, Mr. *Pinsoneault* when he heard of the action hastened to *Canada,* and arrived at *Montreal* on the 25th of May, 1870. Communications took place between his legal advisers and those of the Plaintiff, in the course of which a proposition for settling the action for $30,000 was discussed. Mr. *Pinsoneault,* however, states that on Saturday, the 4th of June, he had determined to plead to the action, and had given instructions for that purpose. On that same 4th of June Mr. *Laflamme* obtained a foreclosure of the

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pleadings in the suit. The Defendant, probably more alarmed than he need have been at this procedure, went to Mr. *Laflamme* (who had been a personal friend of his) on the Sunday morning without consulting his attorney or counsel, and in the course of the day the following document was drawn up by Mr. *Laflamme* :—

"*Henry J. S. King*, Plaintiff, and *Alfred Pinsoneault*, Defendant.

"Memorandum.

"It is agreed that this case is to be settled upon the following terms, viz. :—

"1. The Defendant is to pay to the Plaintiff $30,000 in full settlement of the action, which is to be at once desisted from, the Defendant paying costs to the amount of $50.

"2. Of the above sum of $30,000, $15,000 shall be paid immediately, and the remaining $15,000 shall be invested in hypotheques, or other approved securities, in the joint names of *H. Cotté* and *Thomas W. Ritchie*, Esquires, in trust to pay the interest upon such investment during the period extending from this date to the 31st of December, 1877, to the Plaintiff, at the rate of 5 per cent. per annum, payable semi-annually, and to transfer the capital to him (the Plaintiff) or his representatives at the expiration of that time, provided no action shall have been brought by the representatives of the late *Christiana Harmar* against Mr. *Pinsoneault* or his representatives for or in respect of any of the rents, moneys, or matters or things mentioned in the declaration of this cause, or under and in virtue of the will of the late General *Christie ;* and provided any such action has been brought that it shall have been finally dismissed or disposed of; and if any such action is instituted, then Mr. *Pinsoneault* shall pay the interest of 5 per cent. to the said trustees, who shall deposit the same under the above trust to await the final decision of this action.

"3. If at the expiration of the said time (on the 31st of December, 1877) such an action shall be pending, the capital shall only be paid upon the same being finally dismissed.

"4. If such action shall be brought within the said period of seven years, and shall be finally decided against Mr. *Pinsoneault*, the investment of the said sum of $15,000 shall be transferred to Mr. *Pinsoneault*, together with the interest added thereto.

"5. If Mr. *Pinsoneault* prefers it, the sum of $15,000 may be deposited in any chartered bank of this city selected by him, in the names of Mr. *Cotté* and Mr. *Ritchie,* subject to the foregoing trust.

"*Montreal,* June 4, 1870."

"(Signed) *Alfred Pinsoneault.*
"*R. Laflamme.*

"Attorney for the said *J. S. King.*"

This agreement, which, in the language of the Canadian law, is termed a "transaction," though made on the 5th of June, is dated on the 4th. Mr. *Laflamme,* after the signing of the agreement, gave the Defendant a letter addressed to Mr. *Cassidy,* his counsel and attorney, to the effect that the cause was stayed and the foreclosure removed "*jusqu'à nouvel avis.*"

Mr. *Laflamme* deposes that he had authority from the Plaintiff to enter into this agreement, and that he so informed the Defendant; and it is manifest that the Defendant at the time supposed that he had such authority.

On the next day the Defendant's legal advisers satisfied him that the agreement he had made was an improvident one, and intimated their opinion that the Plaintiff had no cause of action.

On the 10th of June the Defendant executed a notarial instrument revoking the agreement on the ground (among others) that it had not been accepted by the Plaintiff, which instrument was served on that day on Mr. *Laflamme.*

On the 11th of June the Plaintiff wrote and sent a letter to the Defendant, notifying that he was prepared to carry out the agreement and to desist from the action on the payment of the $30,000 as therein provided.

From this time the Plaintiff attempted to enforce the compromise, and the Defendant to resist its enforcement, by all means in their power.

The Defendant sought to put in pleas to the action, and succeeded in spite of the Plaintiff's opposition on the ground of the settlement.

The Plaintiff prayed for judgment in the action in the terms of the compromise, but this was refused on the ground that the Defendant had been admitted to plead.

In January, 1871, the Plaintiff commenced a fresh action on the

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agreement or "transaction" of the 5th of June, 1870, averring his own readiness to perform it, and offering to perform it, and praying that the Defendant might be compelled to perform it. This action is the subject-matter of the present appeal.

The main grounds of defence raised by the pleas to the action were in substance—

1. That the action was not maintainable during the pendency of the original action, because they were for substantially the same cause; or, if that were not so, that the discontinuance of the first action was a condition precedent, under the "transaction," to the bringing of the second.

2. That the proceedings by which the Defendant had been admitted to plead in the original action, and the motion of the Plaintiff for judgment in terms of the compromise had been rejected, were, in effect, a judgment adverse to the Plaintiff's right to enforce the "transaction."

3. That the "transaction" was not intended to be final, but to be conditional on its ratification by the Court.

4. That Mr. *Laflamme* had not authority to make it.

5. That the Defendant was entitled to be relieved from it on the ground of mistake or surprise or fraud.

The three last, with some other grounds, were taken by the same (the third) plea.

These questions after a multiplicity of pleadings and interlocutory proceedings which it is needless to particularize further, came before the Superior Court, when judgment was pronounced by Mr. Justice *Beaudry*.

That judgment is to the effect that the pendency of the first suit is not a bar to the maintenance of the second, and that the defence in the nature of *res judicata* raised by the second plea also failed, but that the suit should be dismissed on the ground that Mr. *Laflamme* had not sufficient general authority, as attorney and counsel in the case, to bind his client by the agreement in question, and that no special authority had been proved, and that the ratification by the Plaintiff of the 11th of June, after the Defendant's repudiation of the 10th, was too late.

On appeal to the Court of Queen's Bench that Court held—

1. That the second action was not maintainable as long as the first was pending.

2. That although the Plaintiff might have enforced the "transaction" in the first action, he had not done so by the proper pleading.

The reasons of this judgment are thus stated by Chief Justice *Duval*:—

"I express no opinion on the validity of the settlement pleaded, but I hold that no separate action can be brought on it *pending* the first action instituted. *King* ought to have discontinued his first action brought, before instituting the present, or to have pleaded this as an *incident* to the first."

The Court thereupon confirmed the judgment of the Court below, but not for the reasons therein alleged, "reserving liberty to the Defendant to resort to any means he may be advised for the purpose of putting in force the transaction."

In giving this judgment the Court was far from being unanimous.

Judges *Taschereau* and *Monk* dissent from it, holding that the action was maintainable, and that the Plaintiffs were entitled to succeed upon the merits. The judgment is that of Chief Justice *Duval*, Judges *Polette* and *Badgley*, the latter of whom, though subscribing to the judgment, and holding that the action was not maintainable pending the former action, doubts whether "the transaction" was not properly pleaded in the first action, and, expressing a regret, in which their Lordships sympathize, that the Court having all the evidence before them for deciding the merits should feel themselves unable to do so, gives his own opinion in favour of the Defendant.

Their Lordships concur with the Superior Court and with Judges *Taschereau* and *Monk* that the pendency of the first action was not a bar to the institution of the second.

The actions were not for the same cause. The first action was brought against *Pinsoneault* and *Hamilton*, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sums received by *Pinsoneault* with payment thereof; or, in default of such account and payment, for damages. The second action was brought against *Pinsoneault* alone to enforce an agreement of 1870, and not only to obtain payment of a sum of

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money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their Lordships' opinion, concurrent conditions, and this being so, it was sufficient for the Plaintiff to aver in his declaration that he had been and was ready and willing, and that he offered to perform his part, viz., discontinuance of the first action on the Defendant performing his part of the agreement. Their Lordships are further of opinion that he has taken no step inconsistent with this averment, and they find that it is proved in fact.

Although the forms of procedure differ in *England* and *Canada*, some observations of the Vice-Chancellor *Turner* in *Askew* v. *Wellington* (1) are applicable in principle and in reason to the present suit. The Vice-Chancellor observed that some cases which he referred to "appear to establish that at least in cases where the compromise goes beyond the ordinary range of the Court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and I think that, *à fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituting the second.

It becomes, therefore, unnecessary to decide whether or not the Plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their Lordships are of opinion that the Court of Queen's Bench were wrong in declining to give judgment on the validity of "the transaction;" it becomes, therefore, their Lordships' duty to determine this question, and to give the judgment which ought to have been given by the Court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the Court, is

(1) 9 Hare, 65.

not noticed by Mr. Justice *Beaudry*, who seems to have thought his finding on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final.

The next important question that arises is whether or not Mr. *Laflamme* had authority to bind his client by it.

This question again divides itself into two:—

1. Had Mr. *Laflamme* such authority by reason of his being counsel and attorney (*avocat* and *avoué*) in the case?

2. If not, had he express authority from the Plaintiff?

Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of counsel, attorneys, or proctors in this country, founded, as it is, upon laws and customs in a great degree peculiar to ourselves. The law on this subject must be looked for in the *Canadian Code*, interpreted, if its provisions are obscure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice *Badgley*, in his learned judgment, intimates an opinion (as their Lordships understand him) that the "transaction" was invalid because it was not given effect to by a "*jugement d'expédient*," and in support of this view he quotes the following passage from *Pigeau* (*Procédure Civile*, vol. i. pp. 9 and 359):—

"*On peut transiger en justice en passant un jugement de concert qui ordonne ce dont les parties sont convenues; cela se fait très-fréquemment au Châtelet de Paris où l'on appelle cette voie expédient. On dresse le dispositif du jugement sur papier ordinaire, les procureurs le signent et le font signer à leurs cliens*, lorsqu'ils n'ont pas de pouvoir de ceux-ci, *et ne veulent pas prendre sur eux de signer sans pouvoir, à cause de l'importance de l'affaire.*"

The "transaction" by "*jugement d'expédient*," with its formalities, which was only one form of "transaction" according to the French law, has not been adopted or recognised in the *Canadian Code*, which does not require that a "transaction" shall be in any particular form, even if it consists in assenting to a judgment. The passage from *Pigeau*, however, is not unimportant as bearing on

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the general authority of *procureurs*—for if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the rights of their clients without one.

Mr. *Laflamme* was both "*avocat*" and "*avoué*." It does not appear, however, that the law gives him any greater authority in his former than he had in his latter capacity. If he had any power analogous to that of a counsel in *England*, to settle a cause "in Court," it is enough to say that it was not this power which he exercised; his power was merely that of an "*avoué*."

No French authority has been cited which goes the length of asserting that an "*avoué*" has a general power to bind his client by a "transaction" such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition.

Much reliance has been placed by the counsel for the Defendant on a passage from *Dalloz's Répertoire de Jurisprudence* ("Transaction," Art. 4, s. 57), which runs thus:—

"*Un mandataire a-t-il le droit de transiger au nom de son mandant? La négative résulte clairement de l'Article* 1988, *Code Nap., à moins que la procuration ne confère expressément ce pouvoir au mandataire. Le mandataire chargé pour une seule affaire ne peut transiger sans un pouvoir exprès.*"

Article 1988 of the *Code Napoléon* is almost identical with Article 1703 of the *Canadian Code*, which is in these terms:—

"The mandate may be either special for a particular business, or general for all the affairs of the mandator. When general it includes only acts of administration. For the purpose of alienation or hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express."

It has been argued that if the inability declared by the French Code to alienate and hypothecate without express powers carried with it the inability to "transact," the same words in the Canadian Code must have the same effect.

The Plaintiff seeks to explain this passage as referring only to the powers of ordinary mandatories, and having no reference to "*avoués*," who are mandatories with extraordinary and exceptional

powers. If, however, a class of mandatories so well known do possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of *Dalloz* concerning "Transactions" is not a little remarkable.

The same doctrine is laid down in other books of authority.

In *Guyot's Répertoire de Jurisprudence* (vol. xvii. "Transaction," p. 235), this is said :—

"*Un procureur ou mandataire peut-il transiger au nom de son commettant? Il le peut sans difficulté, si la procuration lui eût donné expressément le pouvoir ; mais dans le cas contraire toute espèce de transaction lui est interdite.*"

The same doctrine is laid down by *Troplong* (*Droit Civil expliqué*, s. 295), and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly "*avoués*" possess some powers beyond those of ordinary mandatories of binding their principals, unless their acts are expressly disavowed.

This subject is treated of at some length in *Dalloz's Répertoire de Jurisprudence* ("*Désaveu*," s. 3, art. 25) where many instances of such powers are given, not, however, including the power "to transact." It is also treated more succinctly in *Dalloz's Dictionnaire de Jurisprudence, tit.* "*Désaveu*." It is there said that in general every act of a mandatory is void which exceeds the bounds of his mandate, but that it is otherwise with mandatories *ad litem*, who are in some sense officers of justice representing citizens before the tribunals in the exercise of their profession. He thus sums up the law : "*En effet, jusqu'à désaveu tout acte de ministère de l'avoué, mandataire* ad litem, *quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie.*"

It appears to their Lordships that full effect may be given to the meaning of these expressions by treating the "*avoué*" as able to bind his client (until "*désaveu*") by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. The Plaintiff is assumed to have authorized every claim made on his behalf in the declaration, the Defendant every plea pleaded for him ; for example, a plea of the

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Statute of Limitations, or a plea justifying a libel—though he may have prohibited their being pleaded. An illustration of this doctrine is afforded in the present case, where the Plaintiff must be taken to have authorized his claim being based on a false statement of the age at which Miss *Harmar* died, although he may possibly have disapproved of it. Such would appear to be the view taken of this subject by the framers of the Canadian *Code of Procedure*, Article 194 of which is in these terms:—

"A disavowal can only be made by the party himself or his attorney, under a special power, and the party himself must declare that he did not authorize the *act of procedure* which he repudiates."

Their Lordships are of opinion that to enter upon an agreement such as "the transaction" in question, which was in a great measure collateral to the cause, and was capable of being made the subject-matter of a separate suit, cannot be properly termed an act of procedure in the cause.

Their Lordships have not discovered in the Canadian Codes any provision conferring upon "*avoués*" the power of entering into transactions if they did not before possess it. The subject of "mandate" is treated of under the 8th title in five chapters.

Article 1703, which has been above referred to, applied to all mandatories general and special.

Article 1704 is in these terms:—

"The mandatory can do nothing beyond the authority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate.,

And the application of this rule to professional men of various classes, including "*avoués*," is provided for by Article 1705:—

"Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow need not be specified, they are inferred from the nature of such profession or calling."

The only mention of "*avoués*" in the chapter is contained in Article 1732:—

"Advocates, attorneys, and notaries are subject to the general

rules contained in this title ("*mandat*") in so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an Act intituled 'An Act respecting the Bar of *Lower Canada*.'"

It has been admitted that the power contended for is not to be found in this Act.

There are nine Articles in the Code under the head "transaction," none of which appear to have any material bearing on the subject now under discussion.

It does not appear to have been the intention of the framers of the Code to invest "*avocats*" or "*avoués*" with any new or exceptional powers, but rather to apply to them the general law with respect to mandatories as far as it was applicable.

In their Lordships' opinion Mr. *Laflamme* had not authority, by reason of his being "*avocat*" and "*avoué*," to bind his client by this "transaction."

If this be so, the next question is, whether any special authority to make this "transaction" has been proved? It has been admitted that such special authority need not have been in writing.

The evidence relied upon by the Plaintiff on this subject is to be found in an affidavit made by Mr. *Laflamme* in the original suit, which may be referred to, inasmuch as it has been put in evidence by the Plaintiff, in which Mr. *Laflamme* states:—"The Defendant then and there signed the same" (the transaction), "together with this deponent, on behalf of the Plaintiff, *by whom he was fully authorized*." And in his deposition as a witness for the Defendant, "*Je lui dis alors ce que mon client consentirait à accepter, que j'étais autorisé à régler sur ces bases.*" No questions were put to Mr. *Laflamme* by the Plaintiff.

In their Lordships' opinion these allegations are consistent with a belief which Mr. *Laflamme* may have *bonâ fide* entertained, that his character of "*avoué*" gave him authority to conclude the "transaction." Mr. *Laflamme* must have been aware of the importance to his client of proving a special authorization, and if such had been given, he might and probably would have been called by the Plaintiff to prove it. Called by the Defendant, he might still have proved it by putting in the written authority, if

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the authority were in writing, or, if it were given by a verbal communication, by stating the effect of that communication, and where and when it was made. But Mr. *Laflamme* makes no mention of any special authority, and in the absence of such mention their Lordships cannot assume it.

There being no evidence of special authority, it becomes unnecessary to deal with the argument on the part of the Defendant, that, although the special authority need not have been in writing, still that the proof of it, or, at all events, the commencement of proof, must have been in writing, and that no such commencement has here been shewn.

It has been contended further, on the part of the Plaintiff, that even assuming Mr. *Laflamme* not to have been authorized, still the Defendant, having treated him as authorized, could not resile from his agreement, until a reasonable time had elapsed for the ratification of Mr. *Laflamme's* act by his principal; and, in support of this proposition, a passage from *Toullier* has been quoted. It is enough to say that, assuming this to be Canadian law, of which their Lordships are by no means satisfied, in their opinion more than a reasonable time for ratification of the "transaction" by the Plaintiff had elapsed before it was repudiated by the Defendant.

The decision which their Lordships have come to on the question of authority disposes of the case. It therefore becomes unnecessary to determine the further question which would have arisen had their decision on this point been otherwise, whether the Defendant is entitled to relief from the agreement on the ground of mistake, surprise, or fraud, and their Lordships are spared a somewhat painful investigation into many circumstances which it has been unnecessary to notice.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, except so far as it affirms that of the Superior Court, and condemns the Appellant in the costs of the appeal; and to direct that that appeal do stand dismissed and the judgment of the Superior Court affirmed in all respects with the costs of this appeal.

Solicitors for the Appellant: Messrs. *Ranken, Ford, & Co.*

Solicitors for the Respondent: Messrs. *Bischoff, Bompas, & Co.*

IN THE MATTER OF THE COMPANIES ACT, 1864, AND THE AMENDING ACT, 1870–71, AND OF THE TALISKER MINING COMPANY, LIMITED.

J. C.*
1875
March 9, 16.

THE BANK OF SOUTH AUSTRALIA . . APPELLANTS;

AND

ABRAHAM ABRAHAMS AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Power of Directors—Mortgage of Unpaid Capital—Future Calls.

A power in a deed of settlement of a joint stock company authorizing the directors to mortgage or charge the property of the company, does not authorize them to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.

Ex parte Stanley (1) approved.

The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the company; a precedent condition to the absolute proprietary right of the company therein being the due making of a call by a resolution of the board of directors.

ON the 13th of October, 1862, a joint stock company called the *Talisker Mining Company* was formed under a deed of settlement bearing that date. This deed of settlement defined the objects of the company, and the terms according to which its affairs were to be carried on, and, amongst other things, by clause 13 thereof empowered a special general meeting of the shareholders of the company "to authorize the trustees and directors, or any of them, to borrow on mortgage or charge of the property of the company, or on the bonds, debentures, loan notes, or promissory notes of the company, or partly on some and partly on others of such securities, or any other securities which may be available, and which the meeting may approve, any sum or sums, so that no sum exceeding £3000 principal money be due at any one time. . . . And so as no sum or sums of money shall be borrowed by the company until

* *Present*:—SIR JAMES W. COLVILE, THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(1) 4 De G. J. & S. 407; S. C. 33 L. T. 536.

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the whole of the calls (if any) made by virtue of these presents shall be paid up;" and "to amend, add to, or repeal all or any of the clauses or provisions of the deed of settlement of the company which may be in force for the time being, and otherwise to alter the constitution of the company as may be thought proper: provided always, that every alteration in or addition to the deed of settlement effected under this power shall be embodied (at any time or times after the same have been effected) in a supplemental deed or supplemental deeds of settlement, which shall be executed by the chairman of the meeting, and shall thereupon become binding and conclusive on all the shareholders."

By a supplemental deed of settlement of the said company, dated the 10th of April, 1865, duly executed in pursuance of the resolutions in that behalf of two previous special general meetings of the shareholders, it was declared that the capital of the *Talisker Mining Company* should thenceforth be £30,000 instead of £6000 as theretofore, and that the amount payable on each share should thenceforth be £10 instead of £2, and that the *Talisker Mining Company* should be limited by shares, and should be forthwith brought under "the (*South Australia*) *Companies Act*, 1864." And it was further declared as follows:—"That the power to borrow money, contained in the hereinbefore recited deed of settlement (being the deed of settlement of the 13th of October, 1862), shall be extended from £3000, as at present, to £10,000, and that such parts of the said deed of settlement as prevent such borrowing until the whole of the calls made shall be paid up shall be and the same are hereby repealed."

The *Talisker Mining Company* was accordingly, on the 27th of April, 1865, duly registered under the provisions in that behalf of the said *Companies Act*, 1864, as a company limited by shares, by the name of the "*Talisker Mining Company, Limited*," and is hereinafter called "the company."

On the 1st of August, 1865, the company duly issued 129 debentures of £25 each, and assigned to loan trustees for securing the same "all those the unpaid calls on 3000 shares in the company as and when the same should become payable."

By a supplemental deed of settlement dated the 5th of March, 1867, the former deeds were altered so as to increase the borrow-

ing powers of the company to a sum of £15,000, including all sums already borrowed.

On the 1st of August, 1867, the company duly issued 165 fresh debentures of £25 each, whereof 129 were delivered to the holders of the former debentures in cancelment of the same, and the remainder to persons advancing the sum of £25 in respect of each debenture. A new indenture was also executed on that day of the like effect as the deed dated the 1st of August, 1865.

By a further deed of settlement dated the 17th of July, 1869, it was provided "that the capital of the company shall henceforth be £40,000 instead of £30,000 as heretofore; that the number of shares in the said company shall henceforth be 10,000 shares instead of 3000 as heretofore; that the amount payable on each share shall henceforth be £4 instead of £10 as heretofore."

On the 1st of August, 1871, the company having paid off 34 out of the 165 debenture-holders mentioned above, duly issued 136 fresh debentures of £25 each, and delivered the same to the remaining holders of the previous debentures in cancelment thereof, and in satisfaction of the arrears of interest due thereon.

The due payment of the said 136 debentures and interest thereon at the rate of £10 per cent. per annum, on the 1st of February, 1872, were secured by an indenture dated the 29th of August, 1871, and made between the company of the first part, the then directors of the company of the second part, and the Respondents *Breakell* and *Gordon* of the third part, whereby the company (with the concurrence of the directors) assigned unto the Respondents all those the unpaid calls on 10,000 shares in the company as and when the same should become payable, and whether such calls had already been made or not, with full power and authority to and for the Respondents, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, to ask, demand, sue for, recover and receive, and to give effectual receipts and discharges for the same either in their or his own names or name, or in the name of the company, their successors or assigns, to hold the same unto the said Respondents, and the survivor of them, their or his assigns, by way of mortgage to secure the due payment of the principal money and interest secured by the said debentures. And in the said indenture was

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contained a covenant by the company with the Respondents, and the survivor of them, and the executors or administrators of such survivor, their or his assigns, that the company would make such calls as they should be required to do by the Respondents, or either of them, their or either of their executors, administrators, or assigns, provided such calls were authorized by the deed of settlement of the company, or any supplemental deed thereof, to be made at the option of the company. The said indenture also contained a power of sale and other usual mortgage provisions.

By indenture of even date with the said mortgage of the 29th of August, 1871, the loan trustees, under the before-mentioned deeds of the 1st of August, 1867, and of the 1st of August, 1865, reassigned to the company the unpaid calls assigned to them under the said deeds.

On the 4th of June, 1872, the whole of the then unpaid capital of the company had been called up, except the sum of 5*s.* per share; this call amounted in all to £2183 10*s.* There was also due at this time to the company, for arrears of previous calls, the sum of £1240 5*s.*

On the said 4th of June, 1872, the Respondents demanded payment of the moneys due on the said 136 debentures, and the company, on the 5th of June, 1872, replied to this demand, that they were unable to comply with it. Thereupon the Respondents served a notice on the company, demanding of the company and the directors thereof that they should make a call of 5*s.* per share on the shareholders of the company.

On the 8th of July, 1872, it was resolved that the company should be wound up voluntarily, and the Respondent *Abraham Abrahams* was duly appointed liquidator, who thereupon, as such liquidator, on the same day made a call of 5*s.* per share on the shareholders of the company.

The Supreme Court, on the 5th of August, 1872, ordered that the voluntary winding-up of the company should be continued subject to its supervision, and on the 22nd of August, 1873, dismissed the application of the Respondents, *Breakell* and *Gordon* (opposed by the Appellants as the unsecured creditors of the company), that the liquidator should pay the principal and interest due on the said 136 debentures out of the moneys realised by him

in respect of the call of 5*s.* per share made by him as aforesaid, and in respect of the arrears of previous calls due by the shareholders. On the 17th September, 1873, a majority of the Appeal Court reversed this dismissal and ordered as prayed.

Mr. *A. G. Marten*, Q.C., and Mr. *Robinson*, for the Appellants, the unsecured creditors of the company, contended that it was *ultra vires* the company and its directors to give any security upon the capital of the company which had not been called up at the date when such security was given. It was inconsistent with the lawful exercise of the powers of the directors, and with the continuance of the company, so to do. They referred to *Lishman's Case* (1); *In re Sankey Brook Coal Company* (2); *British Provident Life and Fire Assurance Society, Stanley's Case* (3); *King* v. *Marshall* (4); *In re Marine Mansions Company* (5).

Mr. *H. M. Jackson*, Q.C., and Mr. *Romer*, for the Respondents, *Breakell* and *Gordon*, contended that the charge upon the unpaid calls (already and subsequently to be made) was effectual. Until the calls are paid the shareholder is bound by his covenant under seal to abide by all the terms of the articles of association. They cited *In re Panama, New Zealand and Australian Royal Mail Company* (6); *Re The Humber Ironworks Company* (7); *Bloomer* v. *Union Coal and Iron Company* (8); *Holroyd* v. *Marshall* (9); *Webb* v. *Whiffin* (10); *Ex parte Briton and General Medical Life Association* (11).

Mr. *Everitt*, for the liquidator.

1875
March 16.

The judgment of their Lordships was delivered by

THE LORD JUSTICE JAMES :—

The question in this appeal is, whether a power in a deed of settlement of a joint stock company authorizing the directors to

(1) 23 L. T. (N.S.) 759; S. C. 19 W. R. 344. W.R. (1870) 258
(2) Law Rep. 9 Eq. 721; see also Law Rep. 10 Eq. 381.
(3) 4 De G. J. & S. 407; S. C. 33 L. T. 536. 10 Jur. N.S. 713
(4) 33 Beav. 565.
(5) Law Rep. 4 Eq. 601.
(6) Law Rep. 5 Ch. App. 318.
(7) 16 W. R. 667.
(8) 29 L. T. (N.S.) 130.
(9) 10 H. L. C. 191. 9 Jur. N.S. 213.
(10) Law Rep. 5 H. L. 711.
(11) Law Rep. 5 Ch. App. 428.

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mortgage or charge the property of the company, gives them authority to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.

There was a difference of opinion amongst the Judges of the Supreme Court, before which the question was brought on appeal from the order of the primary Judge. The majority were of opinion that the word "property" included future calls, and that the law had been so settled in this country by *Lishman's Case*, a Vice-Chancellor's decision, cited from the "*Law Times*."

The dissentient Judge who had made the order then under appeal admitted that this was so, but thought that the context of the deed excluded that construction in this particular case.

It is much to be regretted that the attention of the Judges was not called to *Stanley's Case* (1), a decision of the Court of Appeal which has been followed in other cases, and has been cited and referred to in every text-book as the leading case authoritatively settling the rule of law.

In that case the words of the power were "property and funds," and it was held that a charge on future calls was *ultra vires* and void. It is impossible to distinguish that case from the one under appeal, and the contention on the part of the Respondents was, that their Lordships, or the ultimate tribunal of appeal, should review that decision, and overrule it, as not being a correct exposition of the law.

Even if their Lordships had any doubt as to that decision, they would not have felt themselves warranted in disturbing a rule which has been uniformly (with the exception of *Lishman's Case* (2)) assented to and acted upon in this country. And it is to be noted with respect to *Lishman's Case* (2) that, although it was after *Stanley's Case* (1) had been decided by the Court of Appeal, the Vice-Chancellor does not appear to have referred to that case, and *Lishman's Case* (2) has not found its way into the authorized reports or text-books.

The decision in *Stanley's Case* (1) appears to be based on very intelligible and reasonable grounds. The capital not paid up is, according to the usual form of deeds of settlement (the form in

(1) 4 De G. J. & S. 407; S. C. 33 L. T. 536. 10 Jur. N.S. 713

(2) 23 L. T. (N.S.) 759; S. C. 19 W. R. 344. W.R. 1870 258

this case), only *sub modo* the property of the company. The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the directors in the exercise of a discretion within limits both of time and amount prescribed by the deed.

The due making of the call by the resolution of a board of directors is an essential condition precedent.

It was held, therefore, in *Stanley's Case* (1), that the general words "power to charge property and funds," could not be intended to, create a charge. It would either leave it optional with the directors to give it effect by making calls which would be nugatory, or it would entirely alter the provisions of the deed as to calls, which is not to be implied.

Their Lordships see no ground for dissenting from that view. They may add that the right of the company is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged, as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect.

In the particular case before them, the power was contained in a deed of settlement of a company which, at the time, was a partnership with unlimited liability; and, although they afterwards availed themselves of the power to register as a company with limited liability, the construction of the deed must, of course, be the same as it originally was.

In such a partnership the provisions as to calls and capital are merely the internal arrangements and bargains of the partners as to raising money for the concern, and it would be a strange thing to pledge these as an additional security to creditors, who had the whole fortune of every shareholder by law pledged to them.

Their Lordships will humbly recommend to Her Majesty that the appeal be allowed, and that the order of the Supreme Court complained of be discharged, and that in lieu thereof there be an order dismissing the appeal to that Court, and affirming the order of the primary Judge with costs.

The Appellants are to have their costs of the appeal, to be paid

(1) 4 De G. J. & S. 407; S. C. 33 L. T. 536.

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by the Respondents, *Breakell* and *Gordon*. The official liquidator will take his costs of the appeal out of the estate.

Solicitors for the Appellants: Messrs. *Hollams, Son, & Coward.*

Solicitor for the Respondents, *Breakell* and *Gordon*: Mr. *H. W. Trinder.*

Solicitors for the Liquidator: Messrs. *Torr & Co.*

J. C.* 1875 *March* 5.

JAMES DOW AND OTHERS . . . . . APPELLANTS;

AND

WILLIAM T. BLACK AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Distribution of Legislative Power—Legislature of New Brunswick.

Held, that the Act of the provincial legislature of *New Brunswick* (33 Vict. c. 47), intituled "an Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*, in the county of *Charlotte*," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute, is within the legislative capacity of that legislature.

Under art. 2 of sect. 92 of the *British North America Act*, 1867, passed by the Imperial Parliament, the provincial legislature is enabled to impose direct taxation for a local purpose upon a particular locality within the province.

The Act in question relates to "a matter of a merely local or private nature in the province," which by the 92nd section of the Imperial Act is assigned to the exclusive competency of the provincial legislature, and does not relate to the railway, or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (*a*) of the said section.

L'Union St. Jacques de Montreal v. *Dame Julie Bélisle* (1) approved.

THE question decided in this appeal was whether the Act of the provincial legislature of *New Brunswick* (33 Vict. c. 47) is within

* *Present*:—SIR JAMES W. COLVILE, THE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH, and SIR MONTAGUE E. SMITH.

(1) *Ante*, p. 31.

the powers of that legislature according to the true construction of the Imperial Statute, the "*British North America Act*, 1867."

The Act in question, intituled "An Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*," is, so far as is material for the present question, in the following terms:—

"Whereas the inhabitants of the town of *St. Stephen*, in the county of *Charlotte*, are desirous of having direct railway connection between *Houlton*, in the state of *Maine*, and the *St. Croix Valley*, in the county aforesaid; and whereas the town of *Houlton* has offered the *Houlton Branch Railway Company* a bonus of $30,000, upon condition that the said *Houlton Branch Railway Company* shall and do construct and suitably equip with necessary rolling stock a railway from the town of *Houlton* aforesaid to the line of the *New Brunswick and Canada Railway and Land Company*, at or near the *Debec Station* so called, and so that the said railway shall be completed and ready for the conveyance of passengers and freight on or before the 1st day of January in the year of our Lord 1872; and whereas the said *Houlton Branch Railway Company* are willing to undertake the building and construction of such connecting line of railway, and have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid, within the time aforesaid, upon the conditions that the town of *St. Stephen* do and shall give to the said *Houlton Branch Railway Company* a bonus of $15,000; and whereas the inhabitants of that portion of the said town of *St. Stephen* called the lower district, and hereinafter particularly described, are willing and desirous to give the said sum for the said purpose, and that the said sum should be raised upon the credit of the real and personal property of the inhabitants of the said lower district in such mode and manner as may be thought most advisable.

"Be it therefore enacted by the Lieutenant-Governor, Legislative Council, and Assembly as follows:—

"1. That upon the said *Houlton Branch Railway Company* giving reasonable and proper security to the justices of the peace in general sessions or special sessions called for that purpose, that the said line of railway from *Houlton* to the line of the said *New Brunswick and Canada Railway and Land Company* shall be built

J. C. 1875 Dow v. Black.

and efficiently furnished and completed, and substantially ready and fit for the conveyance of freight and passengers, and properly provided with all necessary locomotive engines, cars, and carriages, within the time aforesaid limited for so doing; such reasonable and proper security to be by bond under the hand and seal of not less than three responsible persons, resident and having property in this province, under the penalty of $40,000 conditioned as herein above stated, which said bond the said justices are hereby authorized to take and enforce by suit at law for breach thereof, if such shall occur; no person shall be accepted as such security until he shall have first made affidavit before some justice of the peace in the county of *Charlotte*, who is hereby authorized to administer such oath, to be filed in the office of the clerk of the peace for said county, that the value of his property in this province, over and above all his just debts and liabilities, is not less than $20,000; the said justices in general or special sessions shall forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said *Houlton Branch Railway Company*, certificates of debt to be called debentures to the amount of $15,000 in current money of the province of *New Brunswick*, of such denomination or denominations as they may see fit, to be numbered consecutively according to the denomination thereof, from number one upwards, of each denomination, with coupons annexed, bearing interest at 6 per centum per annum, payable semi-annually, at such place as shall be therein specified, and on such conditions and terms as shall be prescribed by the said justices in general or special sessions; the principal money of such debentures to be paid in full at the expiration of twenty years from the date thereof to the holders of the same, at such place and in such manner as shall be prescribed in the same.

"2. The real and personal property of all persons, resident or non-resident, situate in the lower district of *St. Stephen's*, so called, described as follows (then follow the boundaries): 'Shall each and every year, during the continuance of the term of the said debentures, be assessed for the payment of the interest on such debentures, issued under the authority of this Act, an order for which assessment shall be made by the said justices in general or special sessions each and every year as aforesaid, and levied and collected

in the same manner in all respects as parish and county rates are now or may be hereafter assessed, levied and collected, and when collected shall be paid into the *St. Stephen's Bank*, in the county of *Charlotte*, or such other place as may at first or at any subsequent period be selected by the said justices by order of the justices in general or special sessions to the collector of same for the purpose of paying the coupons on said debentures, which coupons shall be paid by the cashier of the said bank or other person selected as aforesaid, to the holders of such coupons, upon presentation thereof out of the funds so deposited.'"

Sect. 3 of the Act provides for a similar assessment by order of the justices in general sessions, for the repayment of the principal sums due on the debentures within twenty years, but at such times and in such mode as the justices shall determine.

Sect. 4 provides for the form of debentures.

Sect. 5 provides for the summoning by two justices of a meeting of the ratepayers of the said lower district of the parish of *St. Stephen*, and enacts that the Act shall not come into force unless it is approved at such meeting by two-thirds of the ratepayers, but that if it is so approved the justices shall certify the same to the governor in council, and the governor shall thereupon announce the same by proclamation in the *Royal Gazette* of the province, and that thereupon the Act shall be *ipso facto* in full operation, force, and effect.

A meeting of the ratepayers of the said lower district of *St. Stephen* was held on the 11th of August, 1870, and the requisite majority of votes in favour of the Act was obtained and the debentures issued.

On the 14th of April, 1871, the justices of the peace at the general sessions for the county of *Charlotte* issued a warrant to the Appellants, the assessors of the parish of *St. Stephen*, commanding them to levy and assess $958. 50*c.* on the lower district of *St. Stephen*, to pay the interest on the said debentures.

The Appellants accordingly assessed the ratepayers of the district, and amongst others the Respondents, and the collector of rates applied to the Respondents for payment, which they refused.

The Respondents thereupon applied for and obtained a writ of

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certiorari to remove into the Supreme Court the said warrant of assessment, and the assessment and all notices and documents upon which they were founded.

A return, and subsequently an amended return, having been made, the Respondents applied for and obtained a rule *nisi* to quash the said warrant and assessment on the ground that the Act 33 Vict. c. 47, related to a railway extending beyond the limits of the province, and was therefore not within the competence of the provincial legislature of *New Brunswick*.

On the 22nd of February, 1873, the Supreme Court (*Ritchie*, C.J., *Allen* and *Weldon*, JJ.) gave judgment, making the rule absolute to quash the said warrant and assessment on the ground stated in the rule. *Fisher*, J., dissented on the grounds, first, that the Imperial Act, sect. 92, sub-sect. 10, paragraph (*a*), related only to railways between two provinces, and not to railways from a province into a foreign country; secondly, that the Court might presume that the money raised by debentures would be applied to the making of the part of the railway within the province, and that an Act to raise money for that purpose was within the competency of the provincial legislature.

Mr. *Benjamin*, Q.C., and Mr. *W. Grantham*, for the Appellants.

Mr. *Fry*, Q.C., and Mr. *Bompas*, for the Respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

This is an appeal against an order of the Supreme Court of the province of *New Brunswick*, making absolute a rule *nisi* that had been granted, and ordering that "the assessment made upon the lower district of the parish of *St. Stephen*, in the county of *Charlotte*, under and by virtue of a warrant of assessment issued to the assessors of the parish of *St. Stephen* by the general sessions of the peace in and for the county of *Charlotte* on the 14th day of April, 1871, directing the said assessors to assess upon the lower district of *St. Stephen* the sum of $958. 50*c*. for payment of interest upon debentures issued under the Act of Assembly, 33

Vict. c. 47, intituled 'An Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*, in the county of *Charlotte*,' and the said warrant and all proceedings upon which the said assessment is based be absolutely quashed."

The ground upon which the majority of the Judges constituting the Court proceeded, was that the Act of Assembly mentioned in the order was itself null and void, inasmuch as it had been passed by the provincial legislature of *New Brunswick*, which, on the true construction of the Imperial Statute, "*The British North America Act*, 1867," had no power to make such a law.

It is necessary, in order to deal with the arguments which have been addressed to their Lordships upon this appeal, to consider shortly under what circumstances this question arose. On the 10th of June, 1867, and before the Imperial Statute just mentioned came into operation, the then legislature of *New Brunswick* passed an Act, by the 6th section of which it was provided,—"That the sum of $5000 per mile, and not exceeding in the whole $17,500, should be granted for the construction of a branch line of railway to the boundary line of the state of *Maine*, from the railway leading from *St. Andrews* to *Woodstock*, to such person or persons or body corporate as shall construct the said road, upon its being proved to the satisfaction of the Governor in Council that a good and sufficient railway is constructed therein within four years from the passing of this Act, and in good working order for travel and traffic." That Act was followed by another passed a few days afterwards, viz., on the 17th June, by which certain persons were made and constituted a body corporate under the name of the *Houlton Branch Railway Company*, and were authorized to make and construct a railway running from the intersection of the *Woodstock* line of railway with the *New Brunswick and Canada Railway*, being a place known as *Debec*, to the boundary line of the state of *Maine* and the province of *New Brunswick*. The 5th section of that Act contains the following provisions—"The president, directors, and company for the time being are hereby authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation for the purpose of locating and completing said railroads

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and branches, and for the transportation of persons, goods, and property of all descriptions; and all such power and authority for the management of the said corporation as may be necessary and proper to carry into effect the objects of this Act, to purchase or hold within or without the province lands, materials, engines, cars, and other necessary things, in the name of the corporation, for the use of the said road, and for the transportation of persons, goods, and property of all descriptions, and to make such connection with other railway companies within or without the province, either by leasing their road to other corporation or corporations, on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway companies or companies, upon such terms as may be agreed upon;" and gives other powers to the new company.

Hence, on the 7th July, 1867, when "the *British North American Act*, 1867," came into operation, the *Houlton Branch Railway Company* had been duly incorporated, and by the Act of a competent legislature had been duly authorized to construct a railway from *Debec* to the frontier that divides the province from the state of *Maine*. Some years afterwards the Act, the validity of which is now called in question, being the 33 Vict. c. 47, was passed.

Its preamble recites that the town of *Houlton*, which is in the state of *Maine*, had offered the *Houlton Branch Railway Company* a bonus of $30,000, upon condition that the said *Houlton Branch Railway Company* should construct and suitably equip with necessary rolling stock a railway from the town of *Houlton* aforesaid to the line of the *New Brunswick and Canada Railway and Land Company*, at or near the *Debec* station, before the 1st of January, 1872; that the *Houlton Branch Railway Company* were willing to undertake the building and construction of such connecting line of railway, &c., and to have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid within the time aforesaid, upon condition that the town of *St. Stephen*,—that being a town in the province of *New Brunswick*,—should give to the said *Houlton Branch Railway Company* a bonus of $15,000; and that the inhabitants of that portion of the said town of *St. Stephen* called the lower district, which was afterwards described, were willing and desirous to give the said sum for the

said purpose, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable. It clearly appears from these recitals that there was a desire, both on the part of the inhabitants of *Houlton*, in the state of *Maine*, and the inhabitants of that portion of *St. Stephen* in the province of *New Brunswick*, or some of them, that this line of communication between the two places should be completed; that its completion was considered to be for the benefit of both communities; and that a portion, at all events, of the inhabitants of that district of *St. Stephen*, in order to effect the arrangement, were willing to be taxed for the purpose of raising the bonus of $15,000 required by the *Houlton Branch Railway Company*. Accordingly the Act of Assembly provided for the carrying out of the arrangement in this way: It required the *Houlton Branch Railway Company* to give reasonable and proper security to the justices of the peace at general or special sessions for the completion of the work; and provided that thereupon the $15,000 should be raised by the issue of debentures to that amount payable twenty years after date, and carrying interest in the meantime. It further provided that the real and personal property of all persons resident in the lower district of *St. Stephens*, as defined by the Act, should be assessed in order to raise the interest on such debentures, and the principal when the latter should become due. But it also provided that the Act should not be in force until it had been accepted and approved by two-thirds at least of the ratepayers liable to be assessed thereunder, whose assent was to be obtained by the machinery thereby provided, and, when ascertained, was to be certified to the Governor in Council,—that is, the Governor-General in Council of *Canada*,—who was to announce the same by proclamation in the *Royal Gazette*. The Act in question was never disallowed by the Governor-General of *Canada;* all the formalities prescribed by it appear to have been complied with, and the assent of the requisite proportion of ratepayers to have been duly notified in the *Gazette*.

In this state of things it is to be presumed that the minority of the ratepayers which dissented from the arrangement was unwilling to pay the rate assessed upon them in order to meet the

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interest on the debentures, and raised this question before the Supreme Court. That Court issued a *certiorari* to remove the proceedings, and, upon the return of the *certiorari*, made the order *nisi*, which the order under appeal has made absolute.

The grounds upon which the Supreme Court has pronounced this Act to be *ultra vires* of the local legislature are entirely derived from sub-sect. (*a*) of the 10th article of sect. 92 of the Imperial Statute. Sects. 91 and 92 purport to make a distribution of legislative powers between the Parliament of *Canada* and the provincial legislatures, sect. 91 giving a general power of legislation to the Parliament of *Canada*, subject only to the exception of such matters as by sect. 92 were made the subjects upon which the provincial legislatures were exclusively to legislate. The 10th article of sect. 92 among those subjects enumerates local works and undertakings other than such as are of the following classes. Then follow the exceptions, and the first of these is, lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province. A question touching the construction of this sub-section has been raised both here and in the Court below. The Respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of *Canada* are all railways which extend either beyond the limits of the province into other provinces within the dominion or into foreign countries. On the other hand, the Appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-sect. (*b*), it will be found to apply only to railways extending beyond the limits of one province into another province of the dominion.

Their Lordships do not think it necessary to determine upon the present appeal this question of construction, or to affirm that if all the legislation that has taken place, including that for the incorporation of the *Houlton Railway Company*, and empowering it to make a railway to the frontier or beyond it, had taken place after the Imperial Statute of 1867 had come into operation, such legislation would have been within the powers of the provincial legislature. They do not think it necessary to determine that question, because they are of opinion that the validity of the Act

of Assembly, the 33 Vict. c. 47, does not depend upon the sub-section in question. They are of opinion that the Act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the company, with its powers, and the construction of the railway up to the frontier, and therefore so far as any legislative power within the British dominions could determine that construction, had been already authorized by the Acts passed before the Imperial Statute came into operation. The Act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of *Maine*. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of *Houlton*, in the state of *Maine*, for the construction of the railway on the terms of the bonus of $30,000 which had been offered to them from *Houlton*, there would have been no legal objection to their carrying out that arrangement. The Act was merely one which enabled the majority of the inhabitants of the parish of *St. Stephen* to raise by local taxation a subsidy designed to promote a work which they considered to be for the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from a private Act authorizing the trustees or guardians of a minor to let a warehouse to such a company. Supposing the work, instead of being a railway, had been a canal, and the inhabitants had been authorized to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject? Their Lordships are therefore of opinion that no objection to the validity of the Act is to be found in the sub-section in question.

Another question has been raised for the first time at this Bar (for the objection does not appear to have been taken in the colonial Court), whether there was power in the provincial legislature to pass an Act by which such an assessment as this could be imposed on the town of *St. Stephen*.

It has been argued that whereas the 91st section reserves to the Parliament of *Canada* exclusive power of legislation in respect of, amongst other subjects, "The raising of money by any mode or

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system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th articles of the 92nd section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorizes direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province.

Their Lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3rd article of sect. 91 is to be reconciled with the 2nd article of sect. 92, by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes. Their Lordships are further of opinion, with Mr. Justice *Fisher*, the dissentient Judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of sect. 92 of the Imperial Statute; and therefore one which the provincial legislature was competent to pass, unless its subject-matter could be distinctly shewn to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of the *L'Union St. Jacques de Montreal* v. *Dame Julie Bélisle* (1), decided on the 8th of July, 1874.

On these grounds their Lordships will humbly advise Her Majesty that the order under appeal be reversed, and that in lieu thereof an order be made discharging the rule *nisi*, which had been granted in Trinity Term, with costs. The Appellants will also have their costs of this appeal.

Solicitors for the Appellants: Messrs. *Upton, Johnson, Upton, & Budd.*

Solicitors for the Respondents: Messrs. *Bischoff, Bompas, & Bischoff.*

(1) *Ante*, p. 31.

OUR SOVEREIGN LADY THE QUEEN . APPELLANT;

AND

HENRY CLARK MOUNT AND WILLIAM CHARLES MORRIS . . . . . } RESPONDENTS.

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Jan. 23, 28, 29; *March* 16.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Habeas Corpus—Penal Servitude for Offences triable by Colonial Courts under their Admiralty Jurisdiction—16 & 17 *Vict. c.* 99, *s.* 6.

M. and *M.*, convicted at the sessions of the Supreme Criminal Court of *Victoria*, of manslaughter committed on board a British ship on the high seas, were sentenced to penal servitude for fifteen years, and were subsequently detained in a public gaol within the meaning of the Colonial Act, the *Statute of Gaols*, 1864. On a return to a writ of *habeas corpus*, to the effect that *M.* and *M.* were detained "for the cause and to the end that they may undergo the sentence aforesaid," the Court ordered that the prisoners "be discharged from their imprisonment and set at large," on the ground that, by 16 & 17 Vict. c. 99, s. 6, sentence of penal servitude could not be carried into execution in the colony without the intervention of the Secretary of State.

Held, by the Privy Council that the return was sufficient; and that in any case the Court erred in not remanding the prisoners until it was clear that no lawful means of executing the sentence could be found.

Rex v. *Allen* (1) distinguished.

Although the Act (12 & 13 Vict. c. 96) under which the Supreme Court obtained jurisdiction over the prisoners only authorized a sentence of transportation according to the law of *England* then in force, and although 20 & 21 Vict. c. 3, which abolished transportation, and substituted penal servitude, does not in terms include the colonies, yet this latter Act is applicable to the colonies with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the former Act on Colonial Courts. The policy of the former Act was to authorize the Colonial Courts to try offences properly cognizable in *England*, with the consequences which would have attended a trial there; and that policy, in the absence of an expressed intention to the contrary, must govern the construction of both Acts.

The direction in 16 & 17 Vict. c. 99, s. 6, that the Secretary of State

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(1) 3 E. & E. 338.

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should point out the place of confinement in case of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure.

Under the combined effect of Imperial and Colonial legislation sentences of penal servitude may be executed in *Victoria;* were this otherwise, a sentence directed by an Imperial Act may not be treated as null, because no means have been previously provided in the colony for carrying it into effect.

THIS was an appeal from a judgment of the Supreme Court of the Colony of Victoria upon the return to a writ of *habeas corpus ad subjiciendum* to bring up the bodies of the Respondents, and a motion made thereon that the Respondents should be discharged out of custody.

The Respondents were informed against for murder on the high seas, under the authority of an Imperial statute 12 & 13 Vict. c. 96, which provides that the Courts in any colony shall have the same authority to try prisoners for offences committed on the sea or any place within Admiralty jurisdiction as if such offences had been committed within the jurisdiction of the Colonial Court; and, by sect. 2, that "if any person shall be convicted before any such Court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by *any law or laws now in force*, persons convicted of the same respectively would be subject and liable to in case such offence had been committed and were inquired of, tried, heard, determined, and adjudged in *England*."

The Respondents were convicted of manslaughter, and sentenced respectively to fifteen years' penal servitude; in accordance with the following opinion of the Judges:—

"The Judges are of opinion that the prisoners cannot be sentenced to transportation, but may be sentenced to be kept in penal servitude for life, or for any term not less than seven years. The execution of that sentence would seem to be a matter of Imperial duty, as the place in which the prisoners are to be confined depends upon the directions of one of Her Majesty's Principal Secretaries of State (16 & 17 Vict. c. 99, s. 6)."

After the passing of the said sentence the Respondents were removed to, and confined in custody at, Her Majesty's gaol at

Melbourne, then being a penal establishment within the meaning of the *Statute of Gaols Act*, 1864, and afterwards, on the 20th of May, 1873, the Inspector-General of Penal Establishments directed, by warrant under his hand, that the Respondents should be removed to Her Majesty's gaol at *Pentridge*, being also a penal establishment within the meaning of the said *Statute of Gaols*, 1864, there to be detained until the expiring of their sentence, or until discharged or removed by lawful authority, and the Respondents were to have been removed to Her Majesty's gaol at *Pentridge*.

Afterwards, on the 12th of December, 1873, a writ of *habeas corpus ad subjiciendum* was issued out of the Supreme Court, directed to the Inspector-General of Penal Establishments, requiring him to bring up the bodies of the two Respondents, and the Inspector-General of Penal Establishments, on the 16th September, 1873, made the following return:—

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"I, *George Oliphant Duncan*, Inspector-General of Penal Establishments in the Colony of *Victoria*, do hereby certify and return in obedience to this writ, that before the coming of the said writ to me, to wit, on the 15th day of April, in the year of our Lord 1873, I did take into custody, and still retain in custody in gaol, the said *Henry Clark Mount* and *William Charles Morris*, under and by virtue of a certain sentence of the Supreme Court of General Gaol Delivery, holden at *Melbourne* on the 19th day of December, in the year of our Lord 1872, delivered in open Court (the said Court being then sitting) for a certain felony, that is to say, manslaughter on the high seas, whereof the said *Henry Clark Mount* and *William Charles Morris* had been by the said Court then and there respectively tried and convicted, which said sentence is that each of them, the said *Henry Clark Mount* and *William Charles Morris*, should be kept in penal servitude for the period of fifteen years; and I do further certify that the said *Henry Clark Mount* and *William Charles Morris* are now detained in my custody, *for the cause and to the end* that they may undergo the sentence aforesaid.

"*Geo. O. Duncan.*"

The return having been read and filed, a motion was made that

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the prisoners be discharged on the ground that they were not in the proper custody.

After the hearing of the motion, the Court delivered a judgment, in which they held that the return was bad, on the ground, among others, that by sect. 6 of the Imperial Statute, 16 & 17 Vict. c. 99, the sentence of penal servitude could not be carried out in any gaol in the colony without the direction of one of Her Majesty's Principal Secretaries of State. An order of the Supreme Court, dated the 17th of September, 1873, was accordingly made, ordering the discharge of the Respondents.

The judgment of the Supreme Court was as follows:—

"On its having been read, it was contended that the return was bad on several grounds. It is not our intention to notice more than one of the objections, namely, that to justify the detention it ought to appear by the return either that the prisoners are held in safe custody until they can be sent to a prison where the sentence of penal servitude passed on them can be carried out, or that they are now in a prison in which, according to the provisions of 16 & 17 Vict. c. 99, s. 6, one of Her Majesty's principal Secretaries of State had directed that the sentence should be carried out. In support of the return it was argued by Mr. Attorney-General that the sentence of penal servitude could be carried out in any gaol in *Victoria* without any direction from a Secretary of State, that it could not be distinguished from imprisonment with hard labour; and by Mr. *Adamson*, who was with him, that it appeared by the return that the prisoners were merely detained until they could be sent to a prison directed by the Secretary of State, to the end that they might undergo the sentence there. According to these arguments, the return has two diametrically opposite meanings. By the first the return conveys to the Court beyond all doubt that the prisoners are now actually undergoing punishment in accordance with the terms of their sentence; by the last it equally clearly appears that they are awaiting the execution of the punishment. The contradictory nature of these arguments, though of itself no objection to either, makes it incumbent on the Court to scrutinise carefully the language of the return. Either of these meanings could have been stated in terms which would admit of no doubt.

So far, however, from this having been done, the return would seem to have been advisedly drawn so as to be susceptible of two, if not of three, different meanings, without distinctly discovering the facts of the case. If it be true that the Secretary of State has directed the sentence to be carried out in the gaol in which the prisoners are detained, nothing would have been easier than to have said so, or if an application had been made to the Secretary of State for his direction, and he had not yet given one, it would have been equally easy to have set that out, as was done in the return in *Leonard Watson's Case* (1), and to add that they were necessarily detained until they could be sent to such a prison as the Secretary of State should direct under the statute. But the principles applicable to such returns as the present, by which they are interpreted in favour of the liberty of the subject, are that while a return would not be held invalid for mere want of form (*Rex* v. *Bethel* (2)), it ought to be direct, certain, and clear, and shew a good *corpus delicti* and a sufficient detainer (*Souden's Case* (3); *Deybel's Case* (4)); which is not to be established by inference nor by a conclusion of law, without setting out the facts or proof from which the Court may draw the conclusion: *Nash's Case* (5). We will not, therefore, indeed we cannot, assign to this return either of these meanings, but read it in the sense in which, according to the contention of the Attorney-General, it was good, which seems to be its proper interpretation.

"It is necessary, therefore, to consider whether the proposition laid down by him, that penal servitude can be carried out in any gaol without the direction of the Secretary of State, can be supported. We are of opinion that it cannot. The punishment of transportation could not have been enforced unless the king in council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo. 4, c. 84, s. 3). A sentence of penal servitude, whether passed in the *United Kingdom* or in a colony, requires the same preliminary act of a Secretary of State (16 & 17 Vict. c. 99, s. 6).

(1) 9 A. & E. 731.
(2) 5 Mod. 19.
(3) 4 B. & A. 294.
(4) Ibid. 243.
(5) 4 B. & A. 295.

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Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labour is to be performed, just as in ordinary cases the sentence of the Court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them, nor is it in any way subservient or auxiliary to its execution. It was submitted that the prisoners should be remanded. If we could see by the return that measures had been adopted to procure the Secretary of State's direction as to the place of imprisonment we might remand them, as was done in *Ex parte Krans* (1); but, as it has been contended that no such direction is necessary, it is to be assumed that no application has been or will be made for such direction. A remand would therefore be oppressive, and in contravention of the law, as we understand it to be. We are of opinion that the return is bad, and that the prisoners must be discharged."

From this judgment the appeal in this case was brought by the Attorney-General for the Colony of *Victoria*, on behalf of the Crown.

Mr. *J. F. Stephen*, Q.C., and Mr. *C. Bowen*, for the Crown, said that the prisoners were tried under 12 & 13 Vict. c. 96, the second section of which subjected them on conviction to the same punishment that they would have been liable to in *England* in 1849, that is, a maximum punishment of transportation for life, or four years' imprisonment under 9 Geo. 4, c. 31. The first point was that the Court inflicted a sentence of fifteen years' penal servitude. [Mr. *Field*, Q.C., gave up the objection that there was no power to pass such sentence, first, because on the authorities that was, perhaps, not a matter to be entertained upon *habeas corpus;* and secondly, an Act had been subsequently passed authorizing such punishment. His objection was that the place of confinement was not appointed by the Secretary of State, and that the person detaining shewed no authority so to do.] The points, then,

(1) 1 B. & C. 258.

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are, first, that the Secretary of State's order was unnecessary; secondly, that in any event the prisoners were not entitled to discharge but should have been remanded to custody for the purpose of obtaining the Secretary of State's order. The question turns on 16 & 17 Vict. c. 99, s. 6. To explain it they referred to the Imperial Acts, 5 Geo. 4, c. 84, 16 & 17 Vict. c. 99, 20 & 21 Vict. c. 3, and 27 Vict. c. 5. So much of these Acts as in this particular case authorized a sentence of penal servitude is applicable to the colonies, otherwise their operation is entirely confined to prisoners sentenced by the Courts of the *United Kingdom*. The directory and executive parts of the statutes apply to convicts sentenced in the *United Kingdom*, not to convicts sentenced in the Colonial Courts, so far, at all events, as those sentences were to be executed in the colonies. Penal servitude under the later statutes is exactly the same as transportation under the old ones. The only difference between 5 Geo. 4, c. 84, which consolidated the law as to transportation, and the two penal servitude statutes of *Victoria* is this, that the former treat transportation as the rule and penal servitude as the exception; and, on the other hand, the later statutes treat penal servitude as the rule and transportation as the exception. Under 5 Geo. 4, when a person is sentenced to transportation he may either be transported at once, or confined at home for the whole or any part of the term. The sentence of transportation really meant compulsory labour, either at home or abroad; and with the exception of sect. 17, the whole statute presupposed a sentence in *England* on a person convicted in *England*. Sect. 17 alone can be said to deal with sentences passed by Colonial Courts, and only then when the prisoners are brought to *England* under those sentences.

As to 16 & 17 Vict. c. 99, the first four sections are repealed. The prisoners have been discharged because sect. 6 is supposed not to have been complied with. That Act, with the Act of Geo. 4, referred to the punishment of persons tried and sentenced to penal servitude by the Courts of *Great Britain*. 12 & 13 Vict. c. 96, gives a general power to Colonial Courts with reference to transportation; and 20 & 21 Vict. c. 3, abolishes transportation. The sentence in this case was not really passed under 16 & 17 Vict. c. 99, in such a sense that it ought in all

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respects to conform to its provisions. Incidentally it enabled the sentence to be passed, but its ministerial and executive provisions are meant for persons convicted in *Great Britain:* see sect. 8 of 20 & 21 Vict. c. 3, passed to amend this Act. [Mr. *Field* said, that under the circumstances of this case there was no power of detention, except under sect. 6 of 16 & 17 Vict. c. 99.] Penal servitude has come to mean being kept to work in *England*, and 16 & 17 Vict. c. 99, enabled the Secretary of State to appoint *Gibraltar* or *Bermuda* as places of confinement for convicts so sentenced. Sect. 6, with reference to prisons which were to be appointed abroad, enabled the Secretary of State, when the colonies objected to transportation, to use military stations as places of confinement. It is contrary to the policy of the Act and all the legislation on the subject to construe sect. 6 as necessitating an application to the Secretary of State before the Government of *Victoria* could legally confine a convict sentenced to penal servitude by the Supreme Court of *Melbourne* in *Pentridge Gaol.* The Colonial Government is, of course, bound to guard its constitutional rights, and not to call on the Secretary of State to interfere unnecessarily in the internal administration of the colony. The whole of the power, moreover, is discretionary in the Secretary of State. Under sect. 8 a like power is given to the Lord Lieutenant of *Ireland,* thus intercepting in that country the exercise of that power which it is said is necessary in *Victoria.*

The 20 & 21 Vict. c. 3, shews that 16 & 17 Vict. c. 99, is confined to persons sentenced in the *United Kingdom.* Sect. 3 of that Act extends to those cases only where persons are confined in places beyond the seas appointed either under 16 & 17 Vict., or under 5 Geo. 4, c. 84. The joint effect of the two Acts might be thus illustrated. Under sect. 6 of 16 & 17 Vict. c. 99, a convict might be sent to *Portland* or *Gibraltar,* appointed under that Act, one in and the other out of the *United Kingdom;* or he could be sent to *Chatham,* appointed in the *United Kingdom* under 5 Geo. 4, but not to *Van Diemen's Land,* appointed under 5 Geo. 4, out of the *United Kingdom.* By 20 & 21 Vict. c. 3, s. 3, such a convict might be sent, if the Secretary of State thought proper, not only to *Portland, Gibraltar,* or *Chatham,* but also to *Van Diemen's Land.* The effect of the Acts is to provide for the

punishment of offenders sentenced in the Home Courts, and no others. It is absurd to suppose that Parliament wished, when penal servitude was ordered in the colonies, that the Secretary of State should direct the place of confinement. As to the operation of these Acts in the colonies, their only effect is to authorize the sentence of penal servitude by conferring upon the Colonial Courts the jurisdiction previously exercised by an Imperial tribunal. The offence is Imperial, the legislation Imperial, and the operation of the Act Imperial. Why, then should it not be affected by subsequent Imperial legislation? On the other hand, the Acts which regulate the execution of the sentence do not apply to the colonies at all, and therefore the order of the Secretary of State is not required.

Upon the whole, the Acts give a power to sentence and provide no mode of execution, but the sentence itself implies a right to detain the convict in prison to enforce the punishment. Throughout the Acts it appears that penal servitude means compulsory detention with hard labour in places fit for the purpose. They then referred to Colonial *Statute of Gaols*, 1864, 27 Vict. c. 219, which empowered the Governor in Council to appoint places of confinement, and to an amending Act of 1871, which authorized the appointment of an inspector-general of penal establishments. [SIR MONTAGUE E. SMITH:—There is a practical distinction between penal servitude and imprisonment with hard labour. The latter is carried out within the walls of a gaol, and generally there is a limit in point of time.] A man under sentence to penal servitude is sent to gaol, and the gaoler can at least detain him till the order of the Secretary of State is obtained. [SIR JAMES W. COLVILE:—I find in the *Goals Act* a reference to 11 Vict. No. 34, which substitutes other punishments for transportation.] Originally the Colony of *Victoria* was a part of *New South Wales*. The earliest of the Victorian laws are those which were enacted by the old legislative council of *New South Wales* before the *Charter Act* passed in 18 & 19 Vict., whereby the Colonial Legislature obtained power to make laws in all cases whatever. The laws passed by that Council, when *Victoria* was subject to it, would remain in force in *Victoria* until affected by subsequent legislation of *Victoria*. [SIR JAMES W. COLVILE:—Only

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two sections of 11 Vict. No. 34, are repealed, viz., sects. 5 and 6.] Originally transportation was a punishment in the colony as well as in *England*. Then labour on the roads and on the public works was substituted for it, and then the colony consolidated its criminal law, and by the *Consolidation Act* regulated all punishments.

It was the duty of the Court under any circumstances to have remanded the prisoners. Admitting the imprisonment to be irregular, where prisoners under sentence are brought up on *habeas corpus*, they are not to be set at liberty for the mere irregularity of detention. The Court should make such order as is consistent with law and justice. They should either have been remanded for the Secretary of State's order, being under a statutory sentence irregularly carried out, or if deemed to have been convicted at common law, they should have been remanded to whomsoever by common law has the custody of convicted criminals. Returns to the writ of *habeas corpus* are no doubt construed strictly in favour of liberty, but the presumption in favour of liberty is shifted after sentence. The presumption cannot be in favour of letting a convicted felon out of gaol. The object of the *habeas corpus* is not necessarily to let a man out of confinement, but it may be to change his confinement, as in old days from the sponging-house to the *Fleet Prison*, and the character of the order to be made must depend on the circumstances which appear before the Court. The object of the writ is that the Court is to make orders about the person. *Reg.* v. *Howes* (1), where an irregular detention was shewn, and the order was not to set at liberty, but to return to a regular detention. [Mr. *Field*:—We say the custody was illegal, not merely irregular. SIR BARNES PEACOCK:—You say that the Supreme Court had no power to imprison him anywhere. Mr. *Field*:—No; if sect. 6 does not apply they might have detained him till the Secretary of State had appointed the place of confinement. SIR BARNES PEACOCK:—Why can they not do that on the return, assuming the return to shew that the custody was illegal? Mr. *Field*:—Because the return insists on the right to detain them absolutely for the fifteen years. He referred to *Re Allen* (2).] *Ex parte Lees* (3),

(1) 3 E. & E. 332. (2) 3 E. & E. 338.
(3) E. B. & E. 828.

according to which the prisoners ought not to be discharged until their sentence and judgment were reversed: The *Canadian Prisoners* (1), otherwise called the case of *Leonard Watson* (2). The Court of Queen's Bench remanded them, and then they were brought up on *habeas corpus* before the Court of Exchequer. They had been convicted of treason in *Canada*, pardoned on condition of transportation to *Van Diemen's Land*, and were brought to *Liverpool Gaol*. The Court of Exchequer also remanded them. The gaoler returned that he detained them in custody in the gaol at *Liverpool* as a measure ancillary to their transportation to *Van Diemen's Land*. It appears from that case that when the Court had before it circumstances justifying the prisoner's detainer in one capacity, they will not discharge him because his detainer in another capacity is irregular. With regard to *Re Allen* (3), there is a broad distinction. It turned entirely upon the construction of certain sections in the *Mutiny Act*, and the validity of an order made by the Adjutant-General. It was a very doubtful question whether the authority existed anywhere to order the confinement of the prisoner in *England*. The keeper of the Queen's Prison could produce no order under which his detention was justified. Here, on the contrary, the prisoners were legally tried, and legally convicted and sentenced. *King* v. *Burridge* (4), where a man had been convicted of clergyable felony, and sentenced to transportation, and escaped from prison, and *Burridge* was indicted for helping him to escape. There was an elaborate argument whether the man was a lawful prisoner, and it was held that not having undergone his sentence he was lawfully confined. In *Reg.* v. *Brenan* (5), a case decided under 5 Geo. 4, c. 84, s. 17, it was held that the statutory provision as to appointing a place of confinement was directory only, and the neglect of it does not vitiate the detention. At common law when a felon has been convicted, and there is no warrant of commitment, the prisoner is removed under sentence of the Court orally pronounced, and his detention is good. In *Allen's Case* (3) no jurisdiction could be exercised except under conditions which were not fulfilled, and there was no legal custody discoverable. They

(1) 5 M. & W. 32.
(2) 9 Ad. & E. 731.
(3) 3 E. & E. 338.
(4) 3 P. Wms. 439.
(5) 10 Q. B. 492–503.

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referred to *Hale's* Pleas of the Crown, p. 593; *Hawkins'* Pleas of the Crown, Book II., c. 19, s. 4, and Book II., c. 15, s. 40; *Cobbett's Case* (1); and to a General History of Transportation in vol. i. of *Chitty's* Criminal Law.

Mr. *Field*, Q.C., and Mr. *Bompas*, for the prisoners, submitted, first, that their detention as returned by the Inspector-General of Gaols was illegal, that is, not authorized by law; and, secondly, that under those circumstances the prisoners were entitled to their discharge. The return must certify the cause *captionis et detentionis*. The return did not shew that any offence had been committed against the municipal law, or of which, but for the provisions of an Imperial Act, the Courts of the colony could take cognizance. It was an imperial offence committed on the high seas; it does not appear whether by British subjects or on a British ship. 12 & 13 Vict. c. 96, gives the power to try and adjudicate, points out the Court and the procedure, and defines the pains and penalties to be suffered. It recites two earlier statutes; the first section is local and colonial with regard to the Courts, the second section applies the law of *England* to the pain and penalty which the convict is to suffer. [SIR ROBERT P. COLLIER:—The effect of the statute is to treat the offence as having been committed in the colony.] Yes; subject to this, that the punishment must be according to the law in *England*. The law in force as to punishment at the date of 16 & 17 Vict. was 9 Geo. 4, c. 31, s. 9. The alternative was transportation for life or a less period, or imprisonment not exceeding four years, being a marked difference as to the term.

Transportation was unknown at common law except by way of conditional pardon: *Chitty's* Crim. Law, vol. i., pp. 789, 790, 791-6. The *Habeas Corpus Act*, 31 Car. 2, c. 2, s. 14, allowed it by way of substitution for death. By 4 Geo. 1, c. 11, s. 1, persons convicted of certain specified offences were to be sentenced to transportation and sent as soon as conveniently could be. 8 Geo. 3, c. 15; 31 Geo. 3, c. 46, s. 7, by which offenders sentenced to transportation may be ordered by the Court to be imprisoned and kept to hard labour in the common gaol for the county as therein mentioned, even during the whole term of their sentence. That

(1) 5 C. B. 418.

statute was repealed by 5 Geo. 4, c. 84, s. 29. Under that Act (sect. 3), His Majesty, with the advice of the Privy Council, was to select the place of confinement. [SIR JAMES W. COLVILE:—Do you know how transportation was conducted in the colony? Mr. *Stephen*:—The practice was to transport from *Victoria* to *Van Diemen's Land* and *Tasmania*, under the power of intercolonial transportation, which is recognised in 5 Geo. 4, c. 84, s. 17.] Throughout the Acts great jealousy is shewn in restricting the place of custody to such places as the Crown or Secretary of State should point out. It is not unreasonable that the *Penal Servitude Act* should exhibit the same jealousy. [SIR MONTAGUE E. SMITH:—That does not apply to the selection of a gaol within the colony itself.] As to 9 Geo. 4, c. 31, there is nothing bearing on the present subject. Then came the change in the law which took place when penal servitude was substituted for transportation, 16 & 17 Vict. c. 99, s. 6. Penal servitude and transportation are substantially the same thing by different names.

Sect. 6 of the latter Act only legalizes one mode of detention, and no other. The direction of the Secretary of State is the only means of defining the place of confinement. [SIR ROBERT P. COLLIER referred to 5 Geo. 4, c. 84, s. 18, as at least authorizing detention for a time.] Under sect. 6 the detention was illegal, because the Secretary of State had not appointed a place of custody. Neither was the detention legalized under the Colonial Acts. See the *Colonial Gaols Act* of 1864, which was a Consolidation Act of the law relating to gaols, and in the schedule is contained the various statutes which that Act repealed. 11 Vict. No. 34, is one of those Acts of which sects. 5 and 6 are repealed. That Act substitutes other punishment for transportation. They referred to *Consolidation of Criminal Law*, No. 233, sect. 291, and 37 & 38 Vict. c. 27, which was passed in consequence of this case.

The next question is, assuming that the prisoners were not lawfully in custody, are they entitled to be discharged? That depends upon the law of *habeas corpus*. See *Bacon's* Abridgment, tit. *Habeas Corpus*, Letter A. The return may be amended at any moment up to filing it. Originally it may have been bad, but up to filing it the person detaining may amend and state the true

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cause of detention. See also, under same title, Letter B. *Habeas Corpus ad subjiciendum.* They referred to *Coke's* Institutes (2nd part) on "*Nullus Liber Homo,* &c." of *Magna Charta,* p. 55, and to the statute of *Charles* II.; also to *Rex* v. *Deybel* (1); *Rex* v. *Nash* (2); *Rex* v. *Souden* (3); *Leonard Watson's Case* (4); *Re Allen* (5). The precise cause of detention must be stated in the return. They referred also to *Ex parte Krans* (6). The gaoler must state in the return the particular ground on which he relies. The question is whether that return, construed strictly in favour of liberty, discloses a right to detain. In this case he returned that he was holding the prisoners in a form of imprisonment which was illegal if for more than four years, while he also returned that he was detaining them "for the cause and to the end" that they might undergo a sentence of fifteen years' penal servitude.

Mr. *Fitzjames Stephen,* Q.C., in reply, accepted the Respondent's construction of the statutes from 4 Geo. 1 to 16 & 17 Vict., viz., that all through the Acts relating to transportation the provisions were such that the Courts regarded with great jealousy the execution of the punishment of transportation, and the Crown alone was to have the right to point out the place to which transportation should be effected. But, he repeated, that the whole of the English Acts, with one or two exceptions, were applicable to sentences passed in *Great Britain* for offences liable to be tried in *Great Britain.* Throughout there was no provision which bore upon the execution of that part of the sentence which was to be executed in the colony. Nor, with two or three exceptions, do they refer to punishments inflicted in the colony after sentence passed in the colony. Each Act, down to 20 & 21 Vict., applies entirely to *England,* and the task of executing sentence in the colony is left to be determined by colonial legislation.

As to the history of colonial transportation, the first reference to it is in sect. 17 of 5 Geo. 4, c. 84; see also sect. 3; and 6 Geo. 4, c. 69, s. 4. Then as to the public statutes of *New South Wales.* Down to the *Charter Act, Victoria,* under the name of *Port Philip,*

(1) 4 B. & A. 243.
(2) Ibid. 295.
(3) Ibid. 294.
(4) 9 Ad. & E. 731; 5 M. & W. 32.
(5) 3 E. & E. 338.
(6) 1 B. & C. 258.

formed part of *New South Wales*, and *Victoria* is still governed by laws of *New South Wales* passed before the *Charter Act*. See 7 Geo. 4, No. 5, which recites the said 6 Geo. 4, c. 69, an Order in Council of the 11th of November, 1825, made under that Act, and a proclamation (in 1826) of the Governor of *New South Wales*, appointing certain penal settlements. That power was first delegated to the Governor by 6 Geo. 4, c. 69. Then see 11 Geo. 4, No. 12, and 3 Will. 4, No. 3, which repealed and consolidated the former Acts. Then we come to 11 Vict. No. 34, 13 & 14 Vict. No. 49; then the Consolidation of Crim. Law, 27 Vict. No. 233. Just as in *England* penal servitude was substituted for transportation, so hard labour in public works was substituted for transportation in *Victoria*, and consequently such hard labour must be regulated by the colonial statutes. Hence the proper way of executing this sentence was under the *Gaols Act*, 1864, and 16 & 17 Vict. c. 99, s. 6, does not apply.

As to *habeas corpus*, *Coke's* Institutes and *Bacon's* Abridgment are not exhaustive. A convicted felon is not to escape because the return of his gaoler is not justified on the particular ground alleged, though it may be justifiable otherwise. It is only to be construed in favour of liberty when a *primâ facie* title to liberty is made out. Here it is admitted that the Inspector-General had a right to detain if he had returned to the effect that he was detaining till the Government had invoked the interference of the Secretary of State in the affairs of the colony. At all events, the gaoler had a right to detain, and the Court should have decided whether he should do so till the sentence had been fully executed, or till the Secretary of State had given directions. *Hale's* Pleas of the Crown, p. 410, on Execution, c. 57, No. 4. [SIR MONTAGUE E. SMITH:—As in a criminal case we cannot take an admission, how do you establish that the sentence is a legal one?] It is passed under 16 & 17 Vict. and 20 & 21 Vict. of the Imperial Legislature. The local extent of those Acts must be determined by considering the nature of their provisions. [SIR BARNES PEACOCK:—Suppose 16 & 17 Vict. does not apply to the colonies, and that the Court ought to have passed a sentence of hard labour on the roads, can we review their judgment on a writ of *habeas corpus?* In appeal we could rectify the judgment, and a Court,

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e.g., the Common Pleas, may have no criminal jurisdiction, while it has in writs of *habeas corpus*.] The prisoners can only take advantage of error in the sentence by appeal, or on writ of error. [Mr. *Bompas* referred to *Ex parte Dunn* (1) to explain the abandonment of that point, and to *Re Crawford* (2).] *Ex parte Lees* (3) is to the same effect.

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

The Respondents (*Mount* and *Morris*) were tried at the sessions of the Supreme Criminal Court of the Colony of *Victoria*, upon a criminal information for murder committed on board a British ship on the high seas, and were convicted of manslaughter.

The Chief Justice, who tried them, entertaining doubts as to the nature of the sentence which, by law, might be passed, consulted the other Judges of the Supreme Court, who were of opinion that a sentence of penal servitude might be awarded; and, accordingly, at a subsequent sessions, the Respondents were sentenced to penal servitude for fifteen years.

In pursuance of this sentence the Respondents were first confined in a gaol at *Melbourne*, being a public gaol within the meaning of the Colonial Act, the *Statute of Gaols*, 1864, and were afterwards, under a warrant of the Inspector-General of Penal Establishments, removed to another gaol at *Pentridge*, being also a public gaol within the meaning of the above Act, there to be detained until the expiration of their sentence, or until discharged or removed by lawful authority.

The Respondents, complaining that their detention in *Pentridge Gaol* was illegal, obtained a writ of *habeas corpus* from the Supreme Court of *Victoria*, to which the Inspector-General made the following return :—[His Lordship read it (4).]

After hearing arguments upon this return, the Court made an order that the prisoners "be discharged from their imprisonment and set at large," mainly, as appears from their judgment, on the ground that a sentence of penal servitude cannot be carried out in

(1) 17 L. J. (C.P.) 97.
(2) 18 L. J. (Q.B.) 275.
(3) E. B. & E. 828.
(4) See *ante*, p. 285.

(38 & 5 Jur. N.S. 588.

any gaol in the colony without the preliminary direction of one of Her Majesty's Secretaries of State. The judgment on this point concludes as follows :—

"The punishment of transportation could not have been enforced unless the King in Council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo. 4, c. 84, s. 3). A sentence of penal servitude, whether passed in the *United Kingdom* or in a colony, requires the same preliminary act of a Secretary of State (16 & 17 Vict. c. 99, s. 6). Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labour is to be performed, just as in ordinary cases the sentence of the Court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them nor is it in any way subservient or auxiliary to its execution."

The present appeal is from the order discharging the Respondents.

It was not disputed by their counsel at their Lordships' Bar that the sentence of penal servitude was correct, and their argument was limited to alleged errors in the manner of its execution.

Before, however, dealing with these objections, it will be convenient shortly to consider the statutory law on which the sentence itself is founded.

The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty, was, for the first time, conferred on Colonial Criminal Courts in 1849, by the Imperial Act (12 & 13 Vict. c. 96). For this purpose it was enacted (sect. 1) that these Courts should have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial, and "for and auxiliary to and consequent upon the trial," as by the law of the colony might have been taken if the

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offence had been committed upon any waters within the limits of the colony.

The second section, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law now in force" persons convicted of the same offence would be liable to in case such offence had been committed, and was "inquired of, tried, and adjudged in *England*."

The words "now in force" occasioned the doubts entertained by the Chief Justice as to the nature of the sentence to be passed.

At the time this Act passed the punishment for manslaughter in *England* (under the 9 Geo. 4, c. 31, s. 9) was transportation for life, or for a term not less than seven years, or imprisonment, with or without hard labour, not exceeding four years, or fine.

In consequence of the difficulty of finding suitable places to which offenders might be transported, penal servitude was substituted in some cases for this punishment by the 16 & 17 Vict. c. 99. This Act was soon followed by the 20 & 21 Vict. c. 3, which enacted that no person should be sentenced to transportation, and that persons who, if the Act had not passed, might have been sentenced to transportation, should be liable to be sentenced "to be kept in penal servitude."

It could not be disputed that penal servitude would have been a proper sentence if the Respondents had been tried in *England*, and the doubt thrown upon the validity of such a sentence in the colony arises upon the question whether the words "now in force" in the 12 & 13 Vict. c. 96, allow of the application in the colonies of the punishment substituted in *England* for that in force when the Act passed.

On this question their Lordships think that, although the Imperial Act abolishing transportation does not in terms include the colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act on Colonial Courts. Such offences might be tried, after that Act, either in *England* or the colonies, and the Legislature clearly expressed its intention that the punishment should be the same, wherever the trial might take place. This

general intent and policy should, therefore, govern the construction of the Acts, unless it plainly appears from the language of the later statute that the Legislature meant to change it.

The words "now in force," in the original Act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence "were inquired of, tried, and adjudged in *England*," shew with distinctness that the Imperial Legislature was conferring power upon the colonies to try offences properly cognizable in *England*, with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in *England*.

When the Imperial Legislature altered that law, and substituted penal servitude for transportation, it is reasonable to suppose that the alteration was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by the 12 & 13 Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that Act, which orders these sentences to be passed according to the law of *England*.

This construction creates no conflict between Imperial and Colonial authority, and in no way affects the rights and privileges of the Colonial Legislatures. It simply affirms that the Imperial statute which gave the Courts of the colonies, *quoad* offences committed upon the seas beyond their territorial limits, a jurisdiction which their own Legislatures could not confer, was altered by a subsequent Imperial Act.

Their Lordships therefore see no reason for disagreeing with the Judges who advised the Chief Justice that a sentence of penal servitude might be passed upon the Respondents.

The only question argued at the Bar, on behalf of the Respondents, related to the manner of executing this sentence in the colony, and must now be considered.

At the passing of the Act conferring Admiralty jurisdiction on the colonies (12 & 13 Vict.), the punishment for manslaughter, according to English law, was, as already stated, transportation, or imprisonment with hard labour for four years.

The 17th section of the Imperial Act (5 Geo. 4, c. 84), which

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consolidates the earlier Acts relating to transportation, recognised the power, then existing in some colonies, to transport offenders; and by the 4th section of the Imperial Act, passed in the following year (6 Geo. 4, c. 69), the King was empowered, by an Order in Council, to authorize governors of colonies to appoint places to which offenders sentenced in the colonies to transportation should be sent.

The Colonial Acts of *New South Wales*, which then included *Victoria* (afterwards made applicable to the new colony by the 14 Vict. No. 49), shew that an Order in Council was issued by the King under the last-mentioned statute, and that provision was made by the Colonial Legislature for carrying sentences of transportation into execution: see 7 Geo. 4, No. 5; 11 Geo. 4, No. 12; 3 Will. 4, No. 3.

But the same difficulty of carrying into execution sentences of transportation was experienced in the colonies as existed in *England*, and accordingly by the *New South Wales Act* (11 Vict. c. 34), it was enacted, whilst continuing the sentence of transportation, that in lieu thereof offenders might be sentenced to be kept to hard labour on roads or public works.

Such was the state of the Colonial law relating to transportation when the Admiralty jurisdiction to try offenders was conferred on Colonial Courts (12 & 13 Vict.), and there would seem to be no sufficient reason for saying, if a sentence of transportation had then been awarded in the colony, that its execution should have been transferred to the English authorities. The direction in the Act that the punishment should be the same as if the trial had been in *England* is satisfied by holding that the nature of the sentence must be the same. It could hardly have been intended, if the sentence were imprisonment, that the offender should be sent to *England* to be confined in an English gaol; or that the provisions relating to transportation from *England*, which include power to imprison in English gaols (see 5 Geo. 4, c. 84, ss. 18, 19), should be put in force.

When the law of *England* abolished transportation, and substituted for it penal servitude, the latter, as already stated, became a sentence which might be lawfully passed by the Colonial Courts when acting under their Admiralty criminal jurisdiction.

The argument for the Respondents came to this: that there being no such punishment as "penal servitude," *eo nomine*, in *Victoria*, such a sentence could be carried into execution only in accordance with the disciplinary regulations of the English statutes, and if those regulations were not applicable, that it could not be carried into effect at all.

It was said that the 6th clause of the Imperial Act (16 & 17 Vict.), which for the first time introduced penal servitude as a substitute for transportation, was applicable to colonial sentences. This section enacts that persons sentenced to penal servitude may be confined in such prison or place in the *United Kingdom* or in Her Majesty's dominions beyond seas, as a Secretary of State may direct. The Supreme Court yielded to this contention, and held that without a preliminary order of a Secretary of State appointing the prison or place where the labour was to be performed, the sentence could not be put into execution.

The question is not free from difficulty; but their Lordships, on the whole, think that the directions in the 6th clause form no part of the sentence. They are not contained in the section of the Act defining the nature of the sentence, nor are they embodied in it when judicially pronounced. It appears to them that these provisions relate only to the manner of its execution and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which, in their view, may be carried into effect in accordance with the procedure provided by them.

It is then said that no legislative provision has been made in the colony for executing this sentence. Supposing this were so, and that a sentence of penal servitude had been absolutely new in the colony, it could by no means follow after the Imperial Legislature had directed such a sentence to be awarded, that, when passed, it might be treated as null, because no means had previously been provided there for carrying it into effect.

But, on behalf of the Attorney-General, it is urged that means do exist in the colony for executing an analogous sentence, which are adapted to executing that of penal servitude.

The Imperial Act, which substitutes penal servitude for transportation, defines or describes the sentence only by the following

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terms: that the offender "be kept in penal servitude;" "kept," of course, implies detention, and "penal servitude" compulsory labour. This, then, is the nature of the sentence.

The Colonial Act (11 Vict. c. 34), provides that in lieu of transportation offenders may be sentenced to be kept to hard labour on roads or public works; and now, by the *Criminal Law Consolidation Act* (27 Vict. No. 233), transportation is virtually abolished in the colony, and detention and keeping to hard labour on public works at places to be appointed for that purpose is substituted for it (sect. 291).

By the *Statute of Gaols*, 1864, the Governor in Council may appoint places in *Victoria* at which offenders under such a sentence of detention shall be detained and kept to hard labour (sect. 4), and it is directed that all gaols and hulks shall be under the charge and direction of the sheriff, or such other officer as the Governor may appoint (sect. 8). By a later Act (the *Statute of Gaols Amendment Act*, 1871), the 8th section of the former Act is repealed, and the Governor in Council is empowered to appoint an Inspector-General of Penal Establishments, who was to have the charge and direction of all gaols and hulks, with power to remove prisoners under sentence from one gaol to another. This statutory officer was invested with the powers which before belonged to the sheriff.

Moreover, by a recent Imperial statute, the *Colonial Prisoners Removal Act*, 1869, which in effect authorizes intercolonial transportation, it is enacted that prisoners, "under sentence of transportation, imprisonment, or penal servitude," may be removed under certain conditions and regulations, and by agreement between any two colonies, from one colony to the other, for the purpose of undergoing their sentence in the other colony. This statute recognises "penal servitude" as a punishment existing in, at least, some colonies, and places it in the same category with "transportation and imprisonment."

In the result, it appears to their Lordships, upon a review of the above-mentioned Acts of the Imperial and Colonial Legislatures, that sentences of penal servitude, in other words, of detention and compulsory service, may be carried into execution in the colony; and, therefore, that the return of the Inspector-General

that he detained the Respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence," is sufficient.

But if this were not so, and if the Judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, some time must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory sheriff; and in any view of the case, the Court should, in their opinion, have remanded the prisoners to his custody, to give the opportunity for an application to the Secretary of State for the order the Court thought necessary. The prisoners who had been convicted of felony, ought not to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found: *Ex parte Krans* (1); *Parker's Case* (2).

The case of *Rex* v. *Allen* (3) was exceptional in its circumstances; the prisoner had been tried by a court martial in *India*, and when he had been brought to *England* under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect.

For these reasons their Lordships will humbly advise Her Majesty to reverse the order under appeal.

Attorneys for the Appellant: Messrs. *Freshfields & Williams.*
Attorneys for the Respondents: Messrs. *Stoneham & Legge.*

(1) 1 B. & C. 258. (2) 5 M. & W. 32.
(3) 3 E. & E. 338.

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WILHELM GUSTAV MIEDBRODT . . . DEFENDANT;

AND

JAMES CHARLES FITZSIMON . . . . PLAINTIFF.

THE "ENERGIE."

ON APPEAL FROM THE COURT OF APPEAL IN CHANCERY, IRELAND.

Merchant Shipping Act Amendment Act, 1862, *ss.* 67, 68—*Wrongful Detention of Cargo under a Stop Order for an excessive Amount—Master warehousing Goods—Damages.*

The *E.* was chartered at *Memel* in October, 1872, to deliver at *Dublin* a full cargo of timber under a bill of lading dated the 6th of November, duly indorsed to Respondent, making the freight payable "as per charterparty," at a specified rate, to be ascertained by measurement. At *Copenhagen* necessary repairs were executed, for expenses of which the master (the Appellant) passed a bottomry bond on ship, cargo, and freight for £2975, payable three days after the ship's safe arrival in *Dublin*, which took place on the 15th of April, 1873. Thereupon the Appellant refused to deliver the cargo to the Respondent until receipt of the contribution which was due from him for general average, then calculated at £1221. This the Respondent refused, but on the 28th he offered to pay the freight and give an average bond. On the 1st of May the owners claimed a lien on the cargo for that amount and for £700 freight, but subsequently the average payable by cargo was ascertained to be £1136, and the owners offered to release the same on receipt of £1800; but the Respondent declined to give more than £1750.

On the 3rd of May the Appellant, notwithstanding the Respondent's offer on that day to pay the average contribution in full, and to give security for the freight, proceeded to discharge the timber into a warehouse of the *Dublin* Port and Docks Board under sects. 67 and 68 of the *Merchant Shipping Act Amendment Act*, 1862, putting upon it a stop order for the sum of £2200, or £360 in excess of what was due by the Respondent. On the 12th the Respondent paid the said sum of £1136, and subsequently tendered payment of freight and (under protest) of charges, but the owners refused to release the cargo until he had discharged the stop order by paying the £2200, which he did after action brought, and was then repaid the balance, £1498, due to him thereout.

In an action brought by the Respondent in the Court of Admiralty in

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Ireland against the ship under the 37th section of the *Court of Admiralty (Ireland) Act*, 1867, claiming damages in respect of certain breaches of duty and breaches of contract on the part of the Appellant:—

Held (affirming the decree of the Court of Chancery in *Ireland*), that the right of action was complete on the 3rd of May, and that it must be remanded to the Admiralty Court to ascertain the damages.

Although the shipowner was at liberty to land the goods under the 67th section of the *Merchant Shipping Act Amendment Act*, the Respondent having "failed to land and take delivery," yet there had been inserted in the stop order a sum manifestly and grossly in excess of that for which the master could *bonâ fide* claim a lien, and consequently the detention of the cargo thereunder was a wrongful act.

And after the payment of £1136 it was clearly the duty of the master to reduce the stop order to the amount for which he then had or could reasonably claim a lien.

APPEAL from a judgment of the Court of Appeal in Chancery, *Ireland*, dated the 13th of May, 1874 (1), which reversed a decree of the High Court of Admiralty, *Ireland*, dated the 12th of January, 1874.

The facts of the case, of which an outline is given in the above head-note, are sufficiently stated in the judgment of their Lordships.

Mr. *Cohen*, Q.C., and Mr. *Clarkson*, for the Appellant.

Mr. *Butt*, Q.C., and Mr. *J. C. Mathew*, for the Respondent.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

The question on this appeal is whether the Respondent (the Plaintiff in the cause and the owner of the cargo), has established a good cause of action against the Appellant (the master of the ship *Energie*), for breach of duty or of contract in relation to the delivery of the cargo. The Judge of the High Court of Admiralty in *Ireland* held that he had failed to do so, and dismissed his suit. The Court of Appeal in Chancery in *Ireland*, to which, subject to a final appeal to Her Majesty in Council, an appeal from the Court of Admiralty lies, reversed that decision, maintained the action, and remitted the case to the Court below

(1) See Irish Eq. Rep. 9 Eq. 58.

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for the purpose of ascertaining the damages. The present appeal is against that judgment.

As to the principal facts in the cause, there is little or no dispute. The vessel was chartered at *Memel* on the 8th of October, 1872, by the agent of *Joseph Dowson & Co.*, of *London*, who shipped thereon a full cargo of fir timber to be delivered at the port of *Dublin* under a bill of lading, dated the 6th of November, and duly indorsed to the Plaintiff, the owner of the cargo. This bill of lading describes the timber by running feet, but makes the freight payable "as per charterparty;" and under the latter instrument freight is to be calculated "per load of fifty cubic feet calliper measure." The vessel encountered severe weather in the *Baltic*, and had to put into *Copenhagen* for repairs, for the expenses of which the master passed a bottomry bond for £2975, payable at or before the expiration of three days after the safe arrival of the ship in *Dublin*, and hypothecating ship, cargo, and freight. The validity of this bottomry bond is not disputed. A general average statement was adjusted by which the sum of £1221 2*s.* 11*d.* was charged against the cargo.

The ship arrived in *Dublin* on the 15th of April, 1873.

There is some dispute as to what then took place. The Plaintiff by his petition alleges that on that day the master called upon him and informed him of the claim on the foot of the bottomry bond, and that until it was settled he could not deliver the cargo. But in his evidence he says this statement in his pleading is incorrect; that the master called upon him on the 16th, and promised to commence delivery on the following day, but on the 17th refused to do so, on the ground that he had received orders from the ship's agents in *London* (Messrs. *Hoffman & Co.*) not to deliver until he should receive further directions from them, there being a charge on the cargo. The master's evidence supports the statement in the petition. Certain, however, it is, that on the 18th the master called on the Plaintiff with a telegram of that date received from Messrs. *Hoffman & Co.*, which is in these words;—"Average statement ready. Net amount due from cargo £1221 2*s.* 11*d.* Ask receivers whether they wish statement sent to *Dublin*, or delivered here. We must have this money to pay bottomry before discharging commences."

And then at least, if not before, the master seems distinctly to have claimed a right of lien on the cargo for the amount due for general average.

The Plaintiff appears to have referred this question of general average to his *London* agents (Messrs. *Tagart, Boyson, & Slee*), who submitted it to the underwriters.

Between the 18th of April and the 1st of May, some correspondence went on between the Plaintiff and the master in *Dublin* and their respective agents in *London*. In *Dublin* the Plaintiff writes on the 28th of April to the master: "We have got a telegram from *London* stating that your claim will be paid, and there is nothing to prevent your discharging our cargo, and we are ready to sign average bond, as you were told on Saturday, so we now hold you accountable for any loss sustained by us by non-delivery of the cargo." In *London*, on the 29th of April, Messrs. *Hoffman & Co.*, in answer apparently to a similar application from Messrs. *Tagart, Boyson & Slee*, write as follows: "It is quite correct that Captain *Miedbrodt* will not discharge until he receives our instructions, and those instructions we cannot give him until the amount due from the cargo is paid to enable us to discharge the bottomry bond, because by that document all the interests are hypothecated to the bottomry holder."

And on the 30th of April the master writes to the Plaintiff, reminding him that the days allowed by the charterparty for taking delivery of the cargo have expired, giving notice that if the conditions precedent necessary to delivery are not complied with within twenty-four hours, he will land the cargo at the risk and expense of the Plaintiff, retaining his lien thereon, and claiming demurrage "at £6 per day, as per charterparty, for every day that may now elapse before cargo is out of the ship."

Thus matters stood on the 1st of May, when Mr. *Harper*, a member of the firm of *Hoffman & Co.*, arrived in *Dublin*. He saw the Plaintiff on that day, and endeavoured to come to a settlement with him. He began by claiming as sums for which there was a lien on the cargo, £1221 2*s.* 11*d.* for general average, and about £700 for freight. The Plaintiff disputed both items. Calculating the freight according to the running feet mentioned in the bill of lading, he made it only £671; and he complained that in the

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average statement the cargo had been valued at £2686, whereas its invoice price was but a little above £2000, and the sum for which it was insured only £2300. Thereupon Mr. *Harper* agreed to calculate the average payable by cargo upon the last-mentioned sum, reducing its amount to £1136 2*s.* 4*d.*: and, after some further discussion, offered to release the cargo on the payment of £1800 and the execution of an agreement that if he should have received too much or too little, the error should be made good to the sufferer. The Plaintiff not assenting to these terms, offered to write a cheque for £1700, and afterwards increased his offer to £1750; but Mr. *Harper* declined to take less than the £1800 and thus, unfortunately for both parties, the negotiation went off on this question of £50 more or less. If the Plaintiff had paid the £1800, he would have got delivery of his cargo on the payment of less than in the event proved to be actually due from him; and if the other party had taken the £1750, they would have succeeded to that extent in their object of being put in funds to meet the bottomry bond; although their right to call upon the Plaintiff for present payment of so large a sum, whilst the bond was outstanding and unproduced, and the precise amount of freight had not been ascertained by measurement, was questionable. Neither party, therefore, evinced much prudence in rendering this attempt to compromise abortive. It is not, however, necessary for their Lordships to say which was on this occasion the less reasonable. They have only to determine whether the master by his subsequent acts incurred a legal liability enforceable in this action.

On the 3rd of May the master, notwithstanding a letter from the Plaintiff of that date offering to pay the proportion of the average falling on the cargo in full, and to give security for the freight, proceeded to discharge the cargo, and place it in the custody of the Port and Docks Board, under the 67th and 68th sections of the *Merchant Shipping Act Amendment Act*, 1862; putting upon it a stop order for the sum of £2200. The delivery though begun on the 3rd was not completed until the 16th of May.

In the meantime the following correspondence took place between Messrs. *Waltons, Bubb, & Walton*, acting as the solicitors of the Plaintiff in *London*, and Messrs. *Hoffman & Co.* The former wrote

on the 5th of May: "We understand that you represent both the shipowner and the bottomry bondholder, and, if this is so, there will be no difficulty. Please let us know how this is, and what amount you claim from the cargo on behalf of your respective clients. Our clients are quite prepared to pay the freight on delivery of the cargo, but we understand that the master, professing to act under your instructions, is refusing to deliver unless the whole freight is paid before delivery. Please see to this." And in answer to this, Messrs. *Hoffman & Co.*, in a letter of the 6th of May, after expressing their satisfaction that the matter had got into the hands of those who were capable of understanding the position of the proprietors of the cargo, and stating that the lay days having expired, and every means having been tried whilst they were running to induce the proprietors of the cargo to pay the amount due from them, the cargo was then being landed by the captain in the custom-house docks, say, "The claims we make upon the cargo are: 1st, £1221 2*s.* 11*d.* contribution to average charges as per Messrs. *Hopkin's* statement" (thereby reverting to their original claim): "2nd. £770 for freight, demurrage, and landing charges, and on payment to us of these two sums we are willing to give a guarantee that shall be made satisfactory to you for the subsequent adjustment of either of the amounts by the repayment by us of any surplus if it should afterwards appear that such has been paid us."

Nothing appears to have come of this correspondence until the 12th of May, when the claim for general average contribution was settled by a payment to Messrs. *Hoffman & Co.* in *London* of £1136 2*s.* 4*d.* upon the terms expressed in the following receipt, which was signed by *Hoffman & Co.*, as agents for the master and shipowners, and also as holders, or agents for the holders, of the bottomry bond:—

"Received from Messrs. *Fitzsimon & Son* the sum of £1136 2*s.* 4*d.*, in full satisfaction and discharge of all claims against the cargo per *Energie* for general average or special charges, as per statement of Mr. *Manley Hopkins*, the contributory value of the said cargo being taken at £2300 instead of £2600, and also in full satisfaction and discharge of all claims against the cargo under the bottomry bond, which is to be liquidated by the shipowner."

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The Plaintiff, having been advised of this payment in *London* through his solicitors in *Dublin* on the 13th of May, offered to lodge with the *Port and Docks Board* the full sum of £770, being the amount of the claim made by the letter of the 6th of May, exclusive of that for general average contribution; but this offer was expressly made under protest for the purpose of obtaining the cargo, and with notice to the board not to part with the money lodged until the Plaintiff should take the necessary steps to compel the refunding of the same. The board declined to deliver the cargo until the stop order for £2200 had been withdrawn, or that sum lodged.

Upon this the Plaintiff appears to have taken simultaneous action in *London* and in *Dublin*. In *London*, on the 14th of May, Messrs. *Waltons, Bubb, & Waltons* wrote to Messrs. *Hoffman & Co.* as follows:—"We have a letter from *Dublin* complaining that, although our clients have offered to deposit with the Port and Docks Board, or to tender under protest £770, being the amount claimed by you for freight charges, &c., the board refused to deliver the cargo on the ground that it is stopped by you for £2200, and that they can accept nothing short of that sum. From this we assume that you have not advised the payment of the general average, and we shall therefore be glad if you will instruct the board by wire to deliver on the £770 being deposited." Messrs. *Hoffman & Co.'s* answer to this communication was written on the 15th, and was in the following terms:—"In reply to your note of yesterday, we can only say that this matter must now take its course, as we fear that we are not justified in interfering now with the original stop."

In the meantime the Plaintiff's solicitors in *Dublin* had served the master of the vessel on the 14th of May with a notice in these terms: "On behalf of Messrs. *James Fitzsimon & Sons*, timber merchants, *Dublin*, we hereby require you to attend at the office of Mr. *Thurgood*, superintendent of the Custom-house Dock, *Dublin*, to-morrow at twelve o'clock noon, at which time and place we shall pay you the sum of £671 10*s.* 4*d.*, being the amount due by Messrs. *Fitzsimons* for freight of goods brought to *Dublin* by the ship *Energie*, or such further sum as you shall shew us to be due for freight only, and we shall pay such sum on your releas-

ing the cargo of the ship *Energie*, so that Messrs. *Fitzsimons* may remove the same."

The master and Mr. *George Fottrell*, one of the Plaintiff's solicitors, did meet at the place and time appointed. There is some discrepancy in their evidence as to what then took place. The master's statement is "that Mr. *Fottrell* had a bundle of notes in his hand. He offered me some money, but I cannot say how much." "They asked me what more I wanted; I said, demurrage and expenses, and shewed them the telegram from *Hoffman* which I received on the 15th, telling me to take any money I could get, but not to release the cargo until the charges should be paid." Mr. *Fottrell* says, "The master said that he would be happy to receive the money, but that he would not release the cargo. He would not take the money on the terms I offered it. But he shewed a telegram which he had from *Hoffman* in these words, 'Receive any money you can get, but don't release the ship.'" This telegram is not produced. Looking at the evidence by the light thrown upon it by the correspondence, their Lordships have come to the conclusion that the Plaintiff was willing to pay what was demanded for freight, though possibly under protest as to anything in excess of £671 10*s.* 4*d.*; and that, on the other hand, the master acting under instructions from Messrs. *Hoffman & Co.*, would not release the cargo except upon payment not only of freight, but of the sums claimed for demurrage and other charges; the whole probably amounting to the sum of £830 5*s.* 7*d.*, as shewn by the subsequent letter of the 26th of May, and the account therein referred to.

The result was that the interview having proved infructuous, the present action was commenced on the same day, viz., the 15th of May.

The only other facts which require mention are, that on the 21st of May, the Plaintiff paid the £2200 to the Port and Docks Board and obtained delivery of his cargo; that at the same time he served the board with a letter in which he admitted the sum of £701 3*s.* 3½*d.* (the then ascertained amount of freight) to be payable to the shipowners, but required them to retain the balance pursuant to the provisions of the 72nd section of the *Merchant Shipping Act:* that on the 26th of May, the master expressed his

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willingness to receive (as he afterwards received) the amount thus admitted to be due for freight, intimating, however, his intention to take proceedings against the Plaintiff for the recovery of the difference between that sum and the £830 5*s.* 7*d.*, and to give the Port and Docks Board the statutory notice of the institution of such proceedings; but that ultimately and about the 8th of July, the Plaintiff did receive the whole balance of the £2200, being £1498 16*s.* 8½*d.*, the shipowners having apparently determined to waive their alleged lien on the fund, and to pursue their remedy against the Plaintiff for the additional amount claimed in an independent action.

It is now to be considered upon what ground (if any) the present action is maintainable.

The judgment of the Court of Admiralty has found, and that of the Appellate Court assumes, that up to the 3rd of May the master was acting within his strict legal rights. Their Lordships do not dissent from that conclusion.

The argument, however, that was addressed to them on behalf of the Respondent makes it desirable to consider briefly what those rights were. That the master had, by common law, a lien for freight, and general average contribution, and, by contract, a lien for demurrage upon the cargo, was not and could not have been successfully disputed. The freight, however, was not payable before delivery, and could only be ascertained by measurement upon delivery. The case, therefore, was one of those in which the payment of the freight and the delivery of the goods are concurrent acts in which, as is shewn by the case of *Paynter* v. *James* (1) all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery, and in which a settlement can hardly be practically effected without some mutual trust and accommodation. In such circumstances the offer to pay so large a proportion of the freight as £650, before breaking bulk, was not unreasonable.

Again, before paying the sum demanded for average, the Plaintiff had a right to be satisfied that it was the result of a proper adjustment. He did not himself see the average statement before the 1st of May, though it had been in the hands of his

(1) Law Rep. 2 C. P. 348; 3 Maritime Cases, 76.

London agents on the 18th of April, when it was forwarded by them to the underwriters. There seems to have been a *bonâ fide* dispute as to the principle of the adjustment, which the subsequent conduct of the shipowners shews to have been at least questionable. He had, moreover, fair grounds for declining to pay the average contribution until he was satisfied that no claim would be made by the bottomry bondholder against the cargo. And of this he had no assurance before the 3rd, if before the 6th, of May. He offered at least, as early as the 28th of April, to sign an average bond, which, there being no doubt of his solvency, it would have been but reasonable in the shipowners to accept. It is true that their object was to get cash in order to pay the bondholder. But the owner of cargo is under no obligation to put the shipowners in funds to meet a debt for which they are primarily liable.

Hence it appears to their Lordships that the detention of the cargo by the master up to the 3rd of May, though not wrongful, was an act done in the rigid exercise of his rights: and that it is fairly open to argument whether, if he chose to detain the cargo under the circumstances above stated, he could impute the delay in its discharge thereby caused to the Plaintiff, or make that a ground for a claim of demurrage. It does not, however, seem to them to be necessary for the determination of this case to consider whether the lien for demurrage, which was once claimed, but finally waived, ever existed; and they abstain the more willingly from expressing an opinion upon this point, because the claim for demurrage is said to be now *sub judice* in another *forum*.

The judgment under appeal has found that there was a wrongful detention of the cargo on and after the 3rd of May; and that a right of action then accrued to the Plaintiff by reason of the delivery to the Port and Docks Board, begun on that day, under a stop order for the excessive sum of £2200.

In support of this judgment it has been argued that the delivery to the Port and Docks Board, of itself and irrespectively of the sum specified in the stop order, was wrongful, inasmuch as the Plaintiff had not "failed to land and take delivery" of his goods within the meaning of the 67th section of the *Merchant Shipping Act Amendment Act*. Their Lordships, however, cannot assent to this

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proposition. They conceive that the word "failed" need not be taken to imply wilful default in the cargo owner; but that, upon the true construction of the section, the shipowner is at liberty to land the goods under it, whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the latter is or is not to blame. They think that this construction is fortified by some of the provisions of the section which, in certain cases, throw the risk and expense of the landing upon the shipowner.

On the other hand it was argued against the judgment that it implies, if it does not express, that the master is liable to an action for damages whenever he lands under a stop order for a sum in excess, no matter how slightly in excess, of the amount due to him. Their Lordships do not so read the judgment. The proposition said to be involved in it is not necessary to support it, and seems to be inconsistent with the 72nd section of the statute, which assumes that the master in some cases may *bonâ fide* have claimed a lien for more than was really due to him.

The provisions of the statute which relate to this question are obviously designed both to give the master the means of discharging the cargo, retaining his lien, and to give the cargo owner the means of obtaining his goods by the deposit of a sum sufficient to cover the master's claim. But they do not extend the lien. The lien for the warehouse rent and charges occasioned by a landing under the 67th section is another and distinct lien created by the 76th section. The words of the 68th clause are: "If the shipowner gives to the warehouse owner notice in writing that the goods are to remain, subject to a lien for freight, or other charges payable to the shipowner, to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the warehouse owner, continue liable *to the same lien, if any, for such charges as they were subject to before the landing thereof.*" If, then, the master wilfully inserts in his notice a sum which he knows to be in excess of that for which he had a lien before delivery, he not only injuriously affects the cargo owner by compelling him to deposit more than the statute requires in order to release his goods, but intends to produce that result by duress of the goods; and thus the delivery to the warehouse keeper is tantamount to a wrongful

detention of the goods, and, as such, an actionable breach of duty. In the present case, the sum inserted in the notice was manifestly and grossly in excess of that for which the master could *bonâ fide* claim a lien. The outside sum claimed so late as the 6th of May was £1991 2*s.* 11*d.*, being £1221 2*s.* 11*d.* for general average, and £770 for freight, demurrage, and landing charges. On the 21st of May the latter item had been swollen to £830 5*s.* 7*d.*, but the average claim had then been settled by the payment of £1136 2*s.* 4*d.*; and even if the sum of £830 had been present to the mind of the master on the 3rd of May as the amount claimable, in addition to the larger sum claimed for average, the aggregate of the two would have fallen short of £2200 by £150.

It was, however, argued that the mere insertion of an excessive sum in the notice is not actionable, because the statute gives to the cargo owner, by the 69th section, the means of releasing his goods otherwise than by a deposit of the sum specified in the notice; viz., by obtaining from the shipowner either a receipt for the amount claimed as due, or a release of freight. But upon the hypothesis that the goods are wrongfully detained by the shipowner for an excessive demand, it is not to be assumed in his favour that he would give such a receipt or release upon the offer of a less sum than that demanded; and a payment to the shipowner under protest would put the cargo owner in a worse position than he would be in by the deposit of the sum claimed by the shipowner; since, in the latter case, the shipowner would have to establish his claim *ultra* the amount admitted by proceedings under the 72nd section; whereas, in an action for money had and received, the burthen of proof would be on the Plaintiff, the cargo owner.

The evidence, moreover, in this case shews that the Plaintiff did his best to obtain his timber under the 69th section. He actually paid the average; he was ready and willing to pay, though under protest, the whole amount demanded for freight; but the master, under the instructions of *Hoffmann & Co.*, refused to release the cargo upon any terms, or at all events upon any terms short of the payment of the £830; which, besides the amount claimed for demurrage, included items for which it is clear that the master when he landed the cargo had no lien. The Plaintiff, therefore,

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was driven to make the deposit of £2200 by the determination of the shipowners to use the stop order as the means of exacting the payment of charges for which they had no lien.

Their Lordships are of opinion that, from the evidence in the cause, the Appellate Court might fairly infer that it was with this object and intention that the excessive amount was originally inserted in the stop order, and, consequently, that the landing and detention of the cargo under that stop order was a wrongful act, which gave the Plaintiff a right of action, as from the 3rd of May.

Had their Lordships been of a different opinion the result would only have affected the date from which the wrongful detention is to be reckoned; for they entertain no doubt that the Plaintiff had a good cause of action on the 15th of May, the date of action brought. After the settlement of the claim for average by actual payment, it was clearly the duty of the master, and of the London agents for the ship, to reduce the stop order to the amount for which they then had, or could reasonably claim, a lien.

This they refused to do; they refused either to release the goods or to reduce the stop order upon the receipt of the freight, which the Plaintiff, on the 15th of May, was ready and willing to pay.

That this would have given to the Plaintiff a right of action, if he had not one before, their Lordships have felt no doubt, but for the reasons above stated they are of opinion that the judgment of the Appellate Court in *Ireland* was correct in finding that the right of action was complete on the 3rd of May.

Upon the point taken, to the effect that the Plaintiff being entitled at most to nominal damages the remand to the Admiralty Court is improper, it is sufficient to say that it is premature to say that the damages, though they may be small, will not be substantial. Their Lordships, will, therefore, humbly advise Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

Solicitors for the Appellant: Messrs. *Hollams, Son, & Coward.*

Solicitors for the Respondent: Messrs. *Waltons, Bubb, & Walton.*

THE COBEQUID MARINE INSURANCE COMPANY . . . . . } DEFENDANTS;

AND

BARTEAUX . . . . . PLAINTIFF.

J. C.*
1875
March 17, 18.

ON APPEAL FROM THE SUPREME COURT OF HALIFAX, NOVA SCOTIA.

Marine Insurance—Power of the Master to sell—Total Loss.

The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is.

Rule made absolute (reversing the order of the Supreme Court) for a new trial, on the ground that the verdict in favour of the insured was against the weight of the evidence as to the necessity for sale.

THE action in which this appeal arose was brought by the Respondent to recover $4000 and interest upon a policy of insurance effected with the Appellants in the sum of $4000 upon the brigantine *Foyle*, valued at $8000, for twelve months, that is to say, from the 23rd of June, 1868, at noon, until the 23rd day of June, 1869.

The writ and declaration were issued on the 10th of August, 1870, and contained two counts on the policy for a total loss, and a common money count for interest.

Pleas:—Firstly, a denial of the making of the policy; secondly, that no proof of the alleged loss and the Respondent's interest in the vessel was ever given to the Appellants, as required by the policy; thirdly, that the vessel was not lost by the perils insured against, or any or either of them; fourthly, that the Respondent was not interested in the vessel to the amount of all the insurance thereon as alleged; fifthly, that the alleged loss was caused by the fraud and negligence of the Respondent and his servants, and not by the perils of the sea as alleged; and, sixthly, that the Appellants were not indebted as alleged.

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

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The cause came on for trial before the Chief Justice of the Supreme Court of *Halifax* and a jury, on the 11th of October. 1871. At the trial the Appellants admitted the making of the policy, that preliminary proof was given to the Appellants as required by the policy, and also that the Respondent was interested in the vessel.

The effect of the evidence adduced is stated in the judgment of their Lordships given below.

The Chief Justice directed the jury as follows;—". . . . The want of a notice of abandoment could only be excused by the necessity of the sale, if that necessity existed. This was a point of a good deal of nicety, which I would reserve, if the Defendant's counsel desired it, for the consideration of the Court. The main question was the alleged necessity for the sale, and the jury must look with a sharp and jealous eye at a transaction marked by many unusual and suspicious circumstances. There was no evidence of a fraudulent stranding. A resident would have avoided the shoal, but it was not on the chart, and it was unknown to the master. Being competent to command the ship, his ignorance or want of caution in this matter afforded no defence to the underwriters. But being on shore, had he exerted himself with sufficient promptitude and energy? I here cited the rules of law as laid down in *Arnold*, and in our own decisions, and put it to the jury whether the master ought to have been content with the discharge of only ten tons of coal on the 16th, and should not have called in on that and the succeeding day a body of the miners or other men in the neighbourhood, and attempted, by their aid, what the purchasers actually effected. The jury should consider, too, whether the holding of the sale on a day sooner than was at first intended was a *bonâ fide* and honest act, or was the result of any contrivance or collusion.

"The survey also had been hurriedly and incautiously drawn; all these facts, on which I forbore to give any opinion, were to be taken into account. There was no proof of the vessel having been over-valued or over-insured, and the master disclaimed any interest in the purchase. Still, if he had precipitated the sale from want of firmness or of judgment, this was one of the cases where the owners must suffer from it. He could sell his own quarter,

but not the other three quarters, so as to bind the insurers, unless an extreme over-mastering necessity, a moral necessity, for the sale had been shewn to the satisfaction of the jury."

The jury found a verdict for the Respondent for $3526, being $4000, the amount of the policy of insurance less $474, being one half of the net proceeds of the sale.

On the 14th of October, 1871, the Appellant company obtained a rule *nisi* for a new trial on the grounds of misdirection, that the verdict was against law and evidence, and for the improper rejection of evidence. On the argument of the rule, on the 8th of February, 1873, the Supreme Court (*Young*, C.J., *Ritchie, Des Barres*, JJ., *Wilkins*, J., dissenting), gave judgment discharging the same.

Mr. *Watkin Williams*, Q.C., and Mr. *Wood Hill*, for the Appellant company:—

This is not a case of constructive total loss at all; even if it were, the sale is not justifiable, in the absence of notice of abandonment. There was no evidence of a total loss. It was not clearly put to the jury whether the master could by means within his reach, and which he could reasonably use, have extricated his vessel, and they were led to suppose that even if he sold without first exhausting those means, the sale might still be justified by necessity. It is a fallacious test to propose, whether the sale was beneficial for all concerned. The jury ought to have been directed that the true question was whether the vessel under the circumstances was in such a condition, taking all things together, that it was not worth while to pursue her any further, or to make any further attempt to save her, with a view to recovering her and restoring her as a sea-going ship, or that the assured would have been justified in abandoning her and giving up all further intention of extricating her from her position.

Mr. *Cohen*, Q.C., and Mr. *Grantham*, for the Respondent:—

If a vessel is placed by the perils of the sea in such a position that the master has implied authority to sell her so as to convey a good title to the purchaser, and acts *bonâ fide*, the insurers are bound. This is a case of absolute not constructive total loss. The

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necessity for sale depends on the evidence of the circumstances existing at the time of the sale, not of what happens after the event. They cited *The Karnak* (1); *Australasian Steam Navigation Company* v. *Morse* (2); *Anderson* v. *Morice* (3); *Ionides* v. *Universal Marine Association* (4); *Dent* v. *Smith* (5).

A new trial should not be granted unless the verdict is clearly perverse. The sale being necessary and in the interest of all parties, passed the property in the ship, and a total loss to the insured resulted: *Farnworth* v. *Hyde* (6); *Barker* v. *Janson* (7). They referred also to *Phillips'* Law of Insurance, vol. ii., p. 248, 249, as to the power of the master, sec. 1524, and as to the effect of the surveyor's report, sec. 1589; *Dixon* v. *Sadler* (8); *Parsons* on Shipping, vol. i., p. 68, sect. 4, ch. 3, and the case of the brig *Sarah Ann* (9), referred to in the note; also cases therein referred to: *Ship Fortitude* (10); *Hayman* v. *Moulton* (11); *Gordon* v. *Mass. Fire and Marine Insurance Company* (12); *Arnold* on Insurance [2nd ed.], p. 1104; and the *Australia* (13).

Mr. *Watkin Williams*, Q.C., in reply, referred to the *African Merchants Company* v. *Harper* recently before the Exchequer Chamber (14); *Reimer* v. *Ringrove* (15); *Navone* v. *Haddon* (16); *Parsons* on Marine Insurance, vol. ii. [Ed. 1868], pp. 145, 147.

The judgment of their Lordships was delivered by

SIR HENRY S. KEATING:—

This was an action brought in *Nova Scotia* upon a policy of insurance effected with the present Appellants in favour of the Respondent. It was a time policy for twelve months upon a vessel called the *Foyle*, which was a comparatively new vessel, being only three years old, and carrying somewhere about 400 tons.

(1) Law Rep. 2 P. C. 506.
(2) Law Rep. 4 P. C. 222.
(3) Law Rep. 10 C. P. 58–70.
(4) 32 L. J. (C.P.) 174.
(5) Law Rep. 4 Q. B. 414.
(6) 34 L. J. (C.P.) 207, 210.
(7) Law Rep. 3 C. P. 303.
(8) 5 M. & W. 414.
(9) 2 Sumner, 206, 215: affirmed on appeal, 13 Pet. 287.
(10) 3 Sumner, 228.
(11) 5 Esp. 65.
(12) 2 Pickering, 262.
(13) 13 Moo. P. C. 132.
(14) Unreported.
(15) 6 Ex. 263.
(16) 9 C. B. 30.

The Plaintiffs in the action below sought to make the insurers liable upon the ground of a total loss, and the total loss relied upon was the sale of the vessel under circumstances which, it was said, justified that sale, and so occasioned to the owners a total loss of the ship.

The cause was tried before the Chief Justice of the Supreme Court of *Halifax*, and he directed the jury that in order to justify the sale it was necessary that an urgent necessity for such sale should be shewn; and he left the question, accompanied by some strong remarks on the facts, to the jury as to whether that necessity existed. A verdict was found for the Plaintiff. Their Lordships do not think it necessary to inquire into the way in which the verdict was afterwards settled upon the figures, because the verdict was only questioned in the Supreme Court upon the ground, first, that the Chief Justice had misdirected the jury, and next, that the verdict as found for the Plaintiff was against the weight of the evidence in the case. The whole Court were of opinion that there was no ground for imputing misdirection in the charge of the Chief Justice to the jury, and in that opinion their Lordships concur. But the majority of the Court were of opinion that the verdict of the jury was so far justified by the evidence that they refused to grant a new trial upon the ground that the verdict was against the weight of the evidence, and discharged a rule obtained for such new trial. One member of the Court took an opposite view, and the appeal comes up here as to how far the majority of the Court was right in refusing a new trial upon the ground that the verdict was against the weight of the evidence in the case.

With reference to the law upon the subject, there seems now to be no doubt whatever; and it cannot be questioned that the master, under circumstances of stringent necessity, may effect a sale of the vessel so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarized in the work of Mr. *Parsons* at p. 147, where he also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be justi-

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fied if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two, and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity. In *Arnold* on Insurance the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support. Mr. *Arnold* says:—

"The exercise, however, of this power"—that is, the power of the master to sell—"is most jealously watched by the English Courts, and rigorously confined to cases of extreme necessity. Such a necessity, that is, as leaves the master no alternative, as a prudent and skilful man acting *bonâ fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies; if he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling, even although the danger at the time appear exceedingly imminent."

That seems to be the true rule to apply in these cases where it is most important to confine within strict limits the powers of a master to sell the ship.

Now, applying that rule to the circumstances of the present case, their Lordships come to the conclusion that this case ought to undergo a further inquiry.

It seems that this vessel, the *Foyle*, being at a place called *Lingan*, in *Nova Scotia*, shipped a cargo of coals to the amount of 420 tons; but that quantity being too great to admit of her passing over the bar of the port, she was lightened, and having passed the bar, again re-shipped the coals which had been taken out of her. On the 16th of June, 1869, at 11 A.M., she weighed her anchor, and in about thirty minutes afterwards ran upon a reef or ledge off the southern head of *Lingan Bay*, at a distance of about 300 yards from the shore, about three miles from *Lingan*, and

about a mile from a place called *Bridgport*. It is material to consider the neighbourhood of that place, because that was a place from which it appears clearly on the evidence assistance could have been obtained. Having run upon this reef, the captain at first signalled for the tug-boat at *Lingan;* the tug came out and attempted to haul the vessel from the reef, but the hawser parted. Having repaired that hawser, it parted a second time. The hawser having parted a second time, the master of the tug, who was called as a witness, seems to have given very good advice, namely, that the ship should be lightened in order that further efforts should be made. The captain of the *Foyle* appears to have acted upon that advice to a certain extent, for about 10 tons were taken out of the vessel by the crew, and they worked at it up to about 9 o'clock that night. Whether that was a sufficient quantity or an insufficient quantity does not become, perhaps, in the result, very material. That was the only quantity that was got out up to that period. The master afterwards became anxious, because he was told that if the wind shifted to the north he would be in great peril. At 5 A.M. on the 17th, he went on shore, and between 10 and 11 A.M. brought off three persons to make a survey of the vessel, and what is called a survey was thereupon made. The surveyors agreed that the vessel should be condemned, and at first were of opinion that the sale might be delayed until the 18th, but they seem suddenly to have changed that opinion and to have thought that the sale ought to take place on the 17th, and with a view to that sale they drew up the form of their survey. They stated, that having—

"Carefully and particularly inspected, examined, and surveyed the said vessel, we find that the said vessel lies stranded off the southern head of *Lingan Bay*, exposed to the storms of the *Atlantic*, making water, lying on a reef, and in a very dangerous position, considerably hogged on the port side, badly strained, rolling heavily on her bilge. We also find that the said vessel lies in such a dangerous position that should the wind happen to change and blow from the north-east, south-east, or east, she would probably go to pieces immediately;"

and they recommend a sale to take place the same day.

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Now, in deciding the question how far the verdict was or was not against the weight of the evidence, Mr. *Cohen* would seem to be justified in saying that the case as made upon the part of the Plaintiff should alone be looked at, as he was entitled to assume that the jury might possibly have believed the case on the part of the Plaintiff and utterly disbelieved all the witnesses on the part of the Defendant, even though no proof is furnished that would justify a conclusion that such was the case. But even looking only to the case of the Plaintiff, and the evidence given upon his part, it appears to their Lordships that this report of the surveyors was manifestly incorrect, and indeed wholly unfounded. There is no evidence that the ship was "making water;" or that shs was "considerably hogged on the port side," or hogged at all; or that she was "badly strained," indeed the reverse was the case; and it is of great importance to observe that these statements as to the vessel were statements of facts which ought to have been apparent to the eye of the master himself how far they were correct or the reverse, as he states that he was present when the vessel was surveyed by the surveyors, and he says, "I saw no pumping, I did not know that she had suffered any injury." In that he was quite right, because in fact the vessel had not suffered any injury, and there was no necessity for pumping because the ship had made no water.

Now, in judging of the question how far the sale was justified by stringent necessity, of course the state of the vessel—that is, not the reported state, but the true state of the vessel, becomes an important element for consideration. Here the vessel was in fact uninjured, as the master must or ought to have known, and yet with the exception of taking a very small quantity of her cargo out and hauling upon the kedge which he could not have supposed would be of any effect, he seems to have done nothing between the 16th and the sale, although it does not appear that all the means subsequently used by the purchasers, which floated her within a few hours, might not have been equally made available by himself for the same purpose had he endeavoured to obtain them. As to the state of weather, there is a conflict of evidence as between a calm and a breeze, but there is no evidence of anything

like rough weather, and whilst the sale was going on, any wind that existed is admitted to have gone down.

The sale took place. It is not necessary to go into the particulars of the sale. The ship was sold of course very much below her value, and purchased by one of the surveyors, for his two nephews, who quickly took the means neglected by the master and floated her substantially uninjured in a few hours.

The Judges who formed the majority of the Court upon this occasion, professed themselves unable to understand or to collect from the evidence why further efforts had not been made.

"In the light of these facts I confess," says the learned Judge who delivers the judgment, which must be taken to be the judgment of the whole of the majority of the Court, "I cannot quite understand the conduct of the master, nor why he did not pursue the course subsequently adopted by the purchasers after his first attempt had failed. The lightening of the vessel by the discharge of her cargo would seem the obvious course to be pursued, and this, on consultation with the master of the tug, was determined upon. He did indeed employ his crew for a time in doing this; but if he really considered his vessel in jeopardy, and *Hall*, the master of the tug, had told him to get the coals out of her, for if the wind came from the north he would lose her, ought he not to have sought assistance from the shore, which he could have obtained as easily as the purchasers did? If I were asked whether in my opinion the master had done what was required of him I should be slow in arriving at the conclusion that he had resorted to all the measures within his reach, and had exerted himself with sufficient promptitude and energy so as to justify the sale of the vessel."

But the learned Judge added that it was a practical matter for the consideration of the jury.

Now their Lordships entirely agree with the learned Judge in their inability to discover on the evidence for the Plaintiff himself why those efforts were not made; and inasmuch as to justify the sale those efforts ought to have been made, there seems to be strong reason for ascertaining how far another jury would agree in the very sound and sensible opinions expressed by the majority of

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the Court themselves, or whether they would coincide in the view taken by the former jury.

Of course their Lordships would be slow to advise a new trial where there was a substantial conflict of evidence. In the present case the record does not disclose the fact whether the Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way, that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict, their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. But in an ordinary case, although the non-expression of the dissatisfaction upon the part of the Judge is generally looked upon as forming a serious obstacle to ordering a new trial, yet at the same time, if it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed.

In this case it would be too much to say that there was no evidence of the stringent necessity that would have justified a sale. Had there been no evidence there would have been a misdirection; but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is, a sale which should be valid as against the insurers—that the verdict of the jury as given was undoubtedly against the weight of the evidence. The learned Judge who dissented, Mr. Justice *Wilkins*, states—

"That he gathered from the opinion expressed by a majority of the Court, that had the respective Judges who composed it been on the jury that tried the cause, they would not have found as the jury found. I should certainly, had I been in the jury box, not have concurred in such a finding. My opinion is, moreover, that wherever such a sentiment pervades the bench in relation to such a case as this, the result of investigation and deliberation that induces it ought to constitute a sufficient ground for setting the verdict aside."

It is not necessary to pronounce an opinion as to how far that does or does not lay down the rule too broadly. It is sufficient to say that the verdict is against the weight of the evidence. The rule which is correctly laid down in *Arnold* seems to fit this case so completely as to render a new trial inevitable upon this evidence:—

"If the master come to the conclusion to sell hastily, either without sufficient examination into the state of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her from the peril, he will not be justified in selling even though the danger at the time appear exceedingly imminent."

Not only in the opinion of the Judges forming the majority of the Court were such efforts not made, but they were unable to perceive even upon the evidence of the Plaintiff himself any reason why those efforts were not made. Their Lordships agree with that view; and therefore they will humbly advise Her Majesty that the judgment of the Court below, refusing to make the rule absolute for a new trial, be reversed, that the rule be made absolute for a new trial, and that the costs of the first trial and of this appeal do abide the event.

Solicitors for the Appellant: Messrs. *Dawes & Son.*
Solicitors for the Respondent: Messrs. *Hill & Son.*

J. C.*
1875
Jan. 26, 27;
Feb. 2;
March 6.

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST. FRANÇOIS XAVIER DE VERCHÈRES . . . . . } PLAINTIFFS;

AND

LA CORPORATION DE LA PAROISSE DE VERCHÈRES . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Fabrique—Power of Marguilliers—Rights of Parishioners—Pleading—"La fin de non-recevoir."

On the 9th of August, 1868, the *curé* of the parish of *V.* was appointed the special attorney of the "*œuvre et fabrique*," at a meeting of the *curé* and present and past *marguilliers* of the *fabrique*, to execute a resolution to which the meeting had come to oppose the formation by the Respondents (the municipal council of *V.*) of a street across the land of the *fabrique* occupied by the *curé*.

In an action brought thereafter by the *curé* in the names of the Appellants against the Respondents, praying that the proceedings of the latter, as to the making of the street, might be declared null and illegal, for an injunction and for damages. Plea: "*La fin de non-recevoir*," to the effect that the Appellants were not competent to bring the action, inasmuch as they were not authorized to do so by the parishioners regularly convened. Replication: the "*autorisation*" given was sufficient, and otherwise could only be questioned by the parishioners and "*fabriciens*" themselves.

Held, that the "*autorisation*" was insufficient and a nullity, and that the plea of "*La fin de non-recevoir*" was correct. In all questions of grave consequence affecting their parish the parishioners, in the absence of a custom, strictly proved, to the contrary, have, on principle and authority, a right to be consulted. The *marguilliers* chosen by the parishioners are only invested with a limited power sufficient for the transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.

Ex parte Renouf (1) approved.

THE Appellants above named are the *fabrique* of the parish of *Verchères*, in the diocese of *Montreal*, *i.e.*, the corporation in which

* *Present:*—LORD HATHERLEY, SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 1 Rev. de Législation, p. 310.

is vested the temporalities belonging to the Roman Catholic church in that parish, and the main question decided in this appeal is as to the persons in whom is vested the right to regulate the acts of this corporation.

The Respondents are the municipal corporation of the same parish, established under a Canadian Statute, 23 Vict. c. 61, which enacts, sect. 12, that the inhabitants of each parish in *Lower Canada* shall constitute a corporation, and provides for the election of a council to manage the affairs of the municipality.

The present action was brought by the Appellants against the Respondents under the following circumstances:—By the *Consolidated Statutes of Lower Canada*, c. 24 (see sects. 27, 28, 37, 45, 46, 50), and several amendment Acts (see 25 Vict. c. 14, and later Statutes), elaborate provisions are made for the management and powers of local municipalities, and for the making by them of new roads in their different districts. The parish of *Verchères* contains an unincorporated village, which was erected by order of the municipal council, dated the 10th of April, 1857.

The municipal council of the parish having entertained a proposal for laying out and forming a new street which would pass across a portion of land of the *fabrique* of the parish occupied by the *curé*, between the same and another part occupied by the convent also belonging to the *fabrique*, public notice was on the 30th of July, 1868, given:—That on the following 10th of August a special meeting of the municipal council would be held for the purpose of considering or reviewing the report (*procès-verbal*) of Mr. *O. Marin*, who had been appointed special superintendent, which report recommended the formation of the said new street.

On the 9th of August, 1868, a meeting was held of the *curé* and *marguilliers* of the *fabrique* assisted by certain past *marguilliers* (but to which meeting the parishioners were not summoned, and at which meeting no parishioner was present who was not or had not been a *marguillier*), and at such meeting the *curé* and *marguilliers*, present and past, without the consent of the parishioners, resolved to oppose the formation of the street, and the confirmation (homologation) of the report, and professed to authorize M. *Joseph Seguin*, the *curé*, to act for and in the name of

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the *œuvre et fabrique* of the parish of *St. François Xavier de Verchères*, and to constitute him the special attorney of the *œuvre et fabrique* for putting in execution the resolution, and for doing generally all that he should judge necessary for defending and preserving the rights of the *œuvre et fabrique* and those of the *curé*, and preventing the formation of the proposed street over the land of the *fabrique* occupied by the *curé;* and the meeting, in consequence of what preceded, and of the offer and guarantee thereafter stipulated, professed to empower the *curé* to select such advocates as he should think fit to choose to act in all causes which might arise relating to the confirmation of the report to the claims of the parties requiring the homologation or to the rights of the *fabrique* in the matter, either as Plaintiffs or as Defendants, before all Courts of justice, whether of the first instance or otherwise; but it was clearly understood by the meeting, on the offer of the *curé*, that all the charges to be incurred by the *fabrique* in relation to the above resolution should be repaid by the *curé*, who had agreed and thereby bound himself to do so.

Accordingly the *curé*, acting on the authority thus conferred, at a meeting of the municipal Council held on the 10th of August, 1868, opposed in the name of the *œuvre et fabrique* of the parish of *Verchères* the confirmation of the report; but notwithstanding such opposition the council confirmed the report with some variations not material to the question between the Appellants and Respondents decided in this appeal.

Thereupon the *curé* appealed in the names of *les curé et marguilliers de l'œuvre et fabrique de la Paroisse de St. François Xavier de Verchères* to the municipal council of the county of *Verchères* against the decision of the local council, confirming the report; but the municipal council of the county on the 7th of September, 1868, dismissed the appeal with costs and confirmed the report, except so far as it provided that no compensation should be paid to the *fabrique* for their land required for the new street.

On the 7th of October, 1868, the Appellants commenced the action against the Respondents which is the subject of this appeal. The declaration alleged that the Appellants had been for a year and a day in undisturbed possession of certain land within

the limits of the unincorporated village of *Verchères;* it then recited the proceedings of the Respondents, and of the municipal council of the county, and alleged that the whole of the proceedings were illegal and void; that by the proceedings the Respondents had troubled the Appellants in the enjoyment of their land, and further, that the Respondents were on the point of taking possession of the land, and had given instructions for that purpose.

The declaration concluded that the whole of the proceedings should be declared void; that the Respondents should be prohibited from interfering for the future with the enjoyment of the land by the Appellants; and that they should be compelled to pay to the Appellants £250 as damages.

The Respondents, on the 4th of November, filed, first, an exception *à fin de non-recevoir*, which alleged that the *curé* and *marguilliers* were only the administrators of the *fabrique*, and could not bring a claim which related to the real property of the *fabrique* without being authorized to do so at a meeting of the parishioners, and that no meeting of the parishioners had been held to authorize the bringing of the action; that the Respondents were interested in this because a judgment, if recovered by them, would not bind the *fabrique;* secondly, a plea alleging that the homologating the report was not a trouble entitling the parties to proceed otherwise than by way of appeal to the municipal council of the county; that the Appellants had so appealed, and that the decision in that appeal was final; thirdly, a plea alleging in effect that their proceedings were regular and legal; fourthly, the general issue.

On the 10th of November the Appellants demurred to the *fin de non-recevoir*, on the grounds that a meeting of all the parishioners was not required by law, but that a meeting of the ancient and new *marguilliers* was sufficient; secondly, because the objection, if valid, could not be taken by the Respondents, but it was for the parishioners to disavow the proceedings, if taken in their name without sufficient authority.

They also filed a special replication to the same plea, alleging that by a custom of the parish of *Verchères* a meeting of the ancient and new *marguilliers* was entitled to give the requisite authority.

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The Appellants also filed replications to the other pleas, which amounted in effect to a joinder of issue.

The Appellants, by their answers to the Respondents' articulation of facts, admitted that in fact no meeting of parishioners was held to authorize the bringing of the present action.

Witnesses having been examined for the Appellants and Respondents, both as to the *fin de non-recevoir* and as to the merits, the action came on to be tried before the Honourable Judge *Berthelot*, who, on the 30th of December, 1869, gave judgment that, as it was proved that an usage was established and existed from time immemorial in the parish of *Verchères* to summon to the meetings of the *fabrique*, other than those of the *bureau ordinaire*, the parishioners of the said parish to take part in the deliberations and meetings of the past and present *marguilliers* of the parish; that as such usage was not contrary to the laws of the country in this respect, and the Appellants, in order to authorize them to bring the said action, only produced an authority dated the 9th of August, 1868, made and adopted at a meeting of the past and present *marguilliers* of the *œuvre et fabrique* alone, while they ought to have been authorized according to the said usage and law of the country by a meeting convened of all the *fabriciens* and parishioners of the said parish; for the above reasons he sustained the said *fin de non-recevoir* and dismissed the Appellants' action with costs, without prejudice to the right of the Appellants to procure a new authority.

The Appellants, on the 11th of January, 1870, appealed to the Court of Queen's Bench for *Lower Canada*, and the appeal was twice argued; and on the 22nd of March, 1872, the judgment of the Superior Court was affirmed by the decision of four Judges against one.

Mr. *H. M. Bompas*, and Mr. *Kenelm Digby*, for the Appellants:—

An action brought by the *fabrique* is properly brought in the name of the *curé* and *marguilliers*. It rests on the other side to support the plea that the authorization given to the Appellants was insufficient, by shewing that there exists in *Canada*, or at least in the parish of *Verchères*, a positive rule of law that no action can be maintained by the *curé* and *marguilliers* as representing the

fabrique without the consent of the parishioners. We contend (1) that no such rule of law exists in *Canada* generally, or in this parish in particular; and further, that the usage in the parish of *Verchères* shews affirmatively that the *curé* and *marguilliers* have the entire control of the property and affairs of the *fabrique;* (2) that even if the *curé* and *marguilliers* are to be regarded either as the managing body of the corporation called the *fabrique*, or as the agents of the Roman Catholic parishioners, they must have the power of bringing such an action as the present, which has for its object only the protection of the property of the *fabrique;* (3) that it is not open to the Respondents to plead the alleged want of authority in bar of this action.

First: There is no such general rule of law as is contended for by the other side, requiring the authority of the body of parishioners. Ecclesiastical history gives no ground for supposing any such rule to have existed in early times. The *fabriques* were originally entirely managed by the bishop and ecclesiastics. In 1312 lay administrators of ecclesiastical property were first introduced at the Council of *Vienne.* See *Fleury's* Institutes, vol. xix. p. 225–6. See also the Proceedings of the Council of *Mayence* (A.D. 1549); *Coleti's* Collection of Councils, vol. xix. p. 1432; of Council of *Narbonne* (A.D. 1551), vol. xx. p. 1281; of Council of Trent, 22nd session (9th chapter), vol. xx. p. 136; the Decrees (A.D. 1581) of the Provincial Council of *Rouen,* vol. xxi. p. 649. A change gradually came over the management of ecclesiastical property, and the parishioners or inhabitants gradually obtained more power. There is, however, no clear evidence as to who took part in the meetings of the *fabrique* until we come to the eighteenth century. Though the lay element was introduced, the bishops never lost their control. The accounts of the lay officers were rendered annually to the bishops, with scarcely an exception. See *Mémoires du Clergé* (an authorized collection of *arrêts*), *tit.* "*Fabrique.*" The Courts constantly enforced this right. There are several cases where the bishop's consent was asked for in dealing with church property, which was never alienated except under his authority. The bishop alone could create a new parish: see *Durand de Maillane's* Dictionary, *tit.* "*Fabrique.*"

It must however be conceded that, towards the end of the 17th

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and beginning of the 18th centuries, in some of the French *fabriques* a rule similar to that contended for by the other side seems to have existed, and to have been recognised by some *Arrêts de Règlement* made for the *fabriques* of various French parishes by the Provincial Parliaments. See especially the *arrêt* for the parish of *St. Jean en Gréve,* printed in *Guyot, tit.* "*Fabrique,*" p. 239, arts. 1, 4, 24. But it is contended that these *arrêts* were not declaratory of any rule of common law, they were partly of a legislative character, partly based on the custom of the place to which they applied, and cannot be relied on as evidence of the law of *Canada.* In fact, so far as they shew the existence of a rule requiring the authorization of the notables or other parishioners before bringing an action, they appear to be based on the Royal *édits* of April, 1683, *Isambert,* vol. xix. p. 420; August, 2, 1687, *Isambert,* vol. xx. p. 50; October, 2, 1703, *Isambert,* p. 435. See *Hericourt, Loix Ecclésiastiques,* part iii. chap. iv. § 37, who lays down the rule in broad terms, and expressly bases it on the *édit* of 1703. Now, these *édits* are all subsequent to the constitution of the *Conseil Supérieur* of *Canada* in 1663, and were never registered in *Canada.* The authority of the *Arrêts de Règlement* as evidence of Canadian law was exhaustively discussed and overthrown by the judgment of *Lafontaine,* C.J., in *Sénécal* v. *Jarret* (1). It is therefore contended that there is nothing to shew that the rule contended for by the other side was part of the common law brought with them by the first French settlers in *Canada.* The authorities which will be relied on on the other side: *Guyot, tit.* "*Fabrique,*" *Dénizart, tit.* "*Fabrique,*" and others, are all based on the *Arrêts de Règlement,* which have no force in *Canada.*

We contend that the rules governing this question must be looked for entirely in the usages of the different parishes in *Canada.* The first important event after the settlement of *Canada* was the *ordonnance* of *Monseigneur Laval,* the Vicar-General of *Nouvelle France,* providing for the election of new *marguilliers* by the *marguilliers* in charge, and by former *marguilliers;* extended to *Montreal* in 1675 (*Édits et Ordonnances,* vol. ii., p. 57) by an ordinance of the *Conseil Supérieur,* declaring that the *marguilliers* are to conform to the usage and practice observed in all the churches in

(1) 4 Low. Can. Jur. 213.

the kingdom of *France*: "*où il ne se décide rien dans les affaires ordinaires qu'à la pluralité des voix des marguilliers qui sont en charge, et dans les extraordinaires qu'en y appelant les anciens, le curé étant toujours présent.*" It is said that these regulations only applied to particular parishes. We contend, on the other hand, that the customs which really constitute the law governing the various *fabriques* took their origin and characteristics from these ordinances. There is a great deal of evidence in the *Édits et Ordonnances*, shewing that for certain purposes the parishioners were called together, especially for the building or repair of the parish church. This, however, was by the general law a burden to be borne by the inhabitants generally, and general meetings of the parishioners were no doubt held wherever there was any question connected with a voluntary or forced contribution from them. These meetings are quite distinct from the meetings of the *fabrique*, and the *fabrique* itself is a distinct body from the parish. This is well illustrated by the case of *Comté* v. *Curé and Marguilliers of St. Edouard* (1), where it was held that a judgment obtained against the syndics for money due to the builder of a church, or representatives of the parish, could not be executed against the *fabrique*, although the *fabrique* had taken over the church. In short, wherever matters concern the *fabrique* only, such as the election of new *marguilliers*, the rendering of accounts, the management of the property of the *fabrique*, or the bringing or defending actions relating to it, no further authority than that given in the present case was requisite. Where the pockets of the parishioners were concerned it was usual to call the parishioners to the meeting of the *fabrique*. This appears to have been the usual practice in *Canada*, though local usage may have introduced different rules in some parishes. The Canadian Statutes regulating the affairs of the *fabriques* do not recognise the existence of any such general rule of law as is alleged to exist, but are consistent with the fact that different usages prevail in different parishes: see 31 Geo. 3, c. 6; Consol Stat. c. 18, s. 45; 27 Vict. c. 10; 29 Vict. c. 52, s. 6. The case of *Ex parte Renouf* (2) appears to have proceeded on the notion that the *Arrêts de Règlement* were evidence of Canadian law, but if so this view was overthrown by the decision of the

(1) 2 Revue de Législation, p. 127. (2) 1 Revue de Législation, p. 310.

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Court of Queen's Bench in *Sénécal* v. *Jarret* (1), which decided that regard was to be had in every case to local usage. As to the conditions of a valid custom in French law, see *Toullier, Droit Civil Français,* vol. i. § 158 *et seq.* Now, the evidence of local usage of the parish of *Verchères,* so far from establishing the rule contended for by the other side, is conclusive that the practice has been to manage the revenues of the *fabrique* by the *marguilliers* only, and that the consent of the parishioners has never been required except under the concession made by the Bishop of *Montreal* in 1843, when the parishioners were admitted to the meetings for the election of new *marguilliers* and the auditing of accounts. Both before and after that date the consent of the parishioners had never been required to meetings when the property or concerns of the *fabrique* had been dealt with. All the meetings at which they have attended are meetings involving some question of a tax or voluntary contribution affecting the parishioners generally. It is therefore contended that the rule contended for by the other side is not to be found either in the Ecclesiastical law, nor in the common law of *France,* nor in that of *Canada,* nor in the usage of the parish of *Verchères.*

Secondly, the bringing of this action is a matter within the competence of the *curé* and *marguilliers,* who are admitted to hold at all events the position of general agents or administrators of the *fabrique* property. All the authorities shew that such administrators may bring actions for the protection of the property administered by them without special authorization: see the *Arrêt de St. Jean en Grève,* art. xxiv.; *Pothier, Mandat,* Nos. 148–152; *Troplong, Mandat,* No. 291.

Thirdly, if there were a want of authority, it is not for the Respondents to take the objection. [LORD HATHERLEY:—No doubt it has been held that though an official assignee cannot sue without the consent of the creditors, yet the Defendant cannot avail himself of such defence. As against him, it will be presumed that they have given their consent.] If a man's name is used to bring a suit, the rule is that he must disavow his attorney, and then the attorney becomes liable for costs: see the *Code of Procedure,* art. 192 and art. 120, sub-s. 7. Here the *curé* could have been com-

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pelled by mandamus to summon a meeting, and the meeting could have disavowed the action. [SIR BARNES PEACOCK:—It is only the *curé* and *marguilliers* who are suing. How could they call a meeting to disavow their own attorney. If they could disavow they could appoint, and they cannot disavow the very attorney whom they have appointed. Mr. *Matthews*, Q.C.:—I contend that the *curé* and *marguilliers* are a corporation, and that the parishioners do not belong to that corporation.] See *Dalloz, Jurisprudence Général, tit.* "*Désaveu,*" ss. 25 and 74. The parishioners could have intervened. See *Code of Procedure*, art. 155, *et seq.*, or the remedy might be against the *fabrique* as a corporation exceeding the powers under *Code of Procedure*, art. 997.

Mr. *Mathews*, Q.C., and Mr. *Freeling*, for the Respondents:—

The *curé* and *marguilliers* occupy a well-defined position under the French law applicable to this matter which prevails in *Canada*. They are the agents of the general body of the parishioners, with limited powers; they require special authority to enable them to take action in extraordinary cases. It lies on the Appellants to shew that under the usage prevailing at *Verchères* they are entitled to bring this action, an *onus* of which they have not discharged themselves. It is not denied that after the *édit* of 1663, which established the *Conseil Supérieur*, any *édit* of the French King required registration before it had the force of law. But the recognised ecclesiastical law of *France* is in favour of Respondents, and may be relied upon in the interpretation of Canadian law and usage. The *Arrêts de Règlement* appear to be applicable only to particular parishes, but it has been held by the French Courts that they declare the common law on the subject. The *fabrique* did not include any persons outside the *curé et fabriciens*. The parish is a *persona juris*, and may hold and transmit property, it acts through the other *persona juris*, the *fabrique*: see *Jousse, Gouvernement Temporel des Paroisses*, pp. 6 and 7. The *fabrique* consists of the *curé* and old and new *marguilliers*, of whom three are in office at one time, the senior being in charge. Only two meetings are convened for the transaction of business, the *bureau ordinaire* and the general assembly of parishioners: see *Dénisart, vo.* "*Fabrique,*" pp. 358, 359, 360, and *Arrêt de Règlement pour la*

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It is denied that besides the *bureau ordinaire* and the general assembly there is a *tertium quid* called *bureau extraordinaire*. *Consolidated Statutes*, c. 18 (and see 2 Vict. c. 29) provides for the mode of administration and control of the affairs of the parish : see *Baudry's Code*, p. 199. Though according to *Ex parte Renouf* (1),

(1) 1 Revue de Législation, p. 310.

decided in 1844, only "notables" were entitled to be present at elections of *marguilliers*, still the term includes all the tax-paying members of the parish. By 2 Vict. c. 29, which recognised the existing French law, sect. 2, "freeholders" were first mentioned in lieu of inhabitants. The general assembly of the parishioners is required by sect. 45 of *Consol. Stat.* c. 18, not merely in elections, of *marguilliers*, but for other purposes also. "Resident parishioners being householders" are entitled to vote; and see *Baudry's Code*, p. 302.

Besides the general law of France thus demonstrated as recognising the dependence of the *fabrique* on the parishioners, the decisions since 1844 have also affirmed this responsibility. The Appellants in this case admit that their accounts were *ouïs, examinés, arrêtés, clos*, in a general assembly; and on the same principle they had no power to enter on an elaborate and expensive litigation without the consent of the parishioners.

Upon the question whether Respondents may avail themselves of this want of authority, see *Monseigneur Désautel's Manuel des Curés*, pp. 84, 85, and 86. The parishioners can only go to the Court in the name of the *fabrique*, see *Rolland de Villargues, Dictionnaire du Droit Civil*, p. 430, *vo.* "*Autorisation pour plaider*," Nos. 9, 10, and 15. *Sirey, Recueil Général* [1816], vol. xvi. pt. i. pp. 104, 96, 271; *Pigeau's Procédure*, vol. i. p. 77; *Dalloz, Jurisprudence Général, vo.* "*Fabrique des Églises*" [old edition], p. 14, sect. 58; *Merlin's Répertoire, vo.* "*Nullité.*"

As to the question of usage, the view of French law on that subject propounded by the other side is not objected to. But as to the *onus*, it lies upon the other side to displace the general law, and they have not, on the evidence, succeeded in doing so.

Mr. *Bompas* replied:—

Even if the authority of the parishioners were required for the purpose of bringing extraordinary actions, such authority is not required either in *France* or *Canada* for possessory actions. For the usage in *Canada* as regards the *fabrique*, see *Baudry's Code des Curés et Marguilliers et Paroissiens*, p. 200. In *France* there are three degrees of authority—(*a*), that of the *marguillier* in charge; (*b*), of the *bureau ordinaire;* (*c*), of the general assemblies of

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the *fabrique* or parish, which are one and the same thing. He referred to *Nouveau Dénisart, vo.* "*Arrêt,*" sec. v. No. 3; *Merlin's Répertoire, vo.* "*Arrêt,*" sec. 8; *Durand de Maillaine, vo.* "*Fabrique,*" p. 3; *Guyot, vo.* "*Fabrique,*" p. 245, as regards assemblies; *Nouveau Dénisart, tit.* "*Fabrique,*" sect. 2, assemblies. As to whether this action came under the head of an extraordinary expense, and therefore *ultra vires* the *bureau ordinaire,* see *Rolland de Villargues,* vol. i. p. 430; *Pothier, Traité du Contrat,* p. 234; *Merlin's Répertoire, tit.* "*Presumptions,*" No. 12; *Troplong, Droit Civil expliqué,* "*du Mandat,*" p. 296. There is a broad distinction between possessory actions and actions possessory and petitory: see *Code of Civil Procedure,* bk. 2, tit. 2, c. 6. The objection to want of authorization could only be taken by the Respondents if the action were a nullity without it: *Consol. Stat.* c. 18, s. 45. And a nullity can only be taken into account where a nullity has been expressly declared: *Merlin's Répertoire, tit.* "*Nullité.*"

The judgment of their Lordships was delivered by

SIR ROBERT J. PHILLIMORE:—

This is an appeal from a judgment given by the Court of Queen's Bench for the province of *Quebec,* on March the 22nd, 1872, which affirmed a judgment given by the Superior Court on the 30th of December, 1869.

The village of *Verchères,* situate within the limits of the parish of *Verchères,* was in the year 1857 erected into an unincorporated village, in the manner prescribed by the *Consolidated Statutes of Lower Canada.*

The municipal council of this parish having entertained a proposal for forming a new street, which would pass across a portion of land of the *fabrique* of the parish, occupied by the *curé,* between the same and another part occupied by the convent, also belonging to the *fabrique,* public notice was, on the 30th of July, 1868, given, that on the following 10th of August a special meeting of the municipal council would be holden for the purpose of considering or reviewing the report (*procès-verbal*) of the superintendent, who had recommended the formation of the new street.

On the 9th of August, 1868, a meeting was holden of the *curé*

and *marguilliers* of the *fabrique*, and certain former *marguilliers* of the *fabrique*, but no parishioner who was not or had not been a *marguillier* was summoned to it. This meeting, thus composed, resolved to oppose the formation of the street and the homologation or confirmation of the report, and they appointed the *curé* as the special attorney of the *œuvre et fabrique*, to take the necessary steps to execute their resolution, the *curé* binding himself to defray all charges thereby incurred.

On the 10th of August, the next day, the *curé*, acting on this authority, appeared before the municipal council of the parish of *Verchères*, and opposed the confirmation of the report, but the council affirmed it, with some variations not material to the present case. The *curé* appealed from this decision to the municipal council of the county, and that board, on the 7th of September, dismissed the appeal with costs, and confirmed the report, except so far as it provided that no compensation should be paid to the *fabrique* for the land required for the new street.

In the month of October the *curé* brought an action in the names of the Appellants in this cause, that is, "*Les Curé et Marguilliers de l'Œuvre et Fabrique*," &c., against the Respondents, that is, "*La Corporation de la Paroisse de Verchères*," in the Superior Court, and filed a declaration, in which he prayed that the proceedings of the Respondents as to the making of the street might be declared null and illegal, and that the Respondents might be restrained from disturbing the enjoyment and possession by the Appellants of their land, and he prayed also for damages.

To this action the Respondents put in a plea known to French jurisprudence as "*la fin de non-recevoir*," to the effect that the Appellants were not competent to bring the action, inasmuch as they were not authorized to do so by the parishioners regularly convened. They also put in further pleas which it is unnecessary to specify. The Appellants replied that the authority of the parishioners was not required by law to enable them to bring the action, but that the authority given by the present and past *marguilliers* was sufficient; they further replied that it was not competent to the Respondents to raise this question of the *autorisation*, which could only be raised by the parishioners and *fabriciens* disavowing the attorney or the Appellants in the action, and that the

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plea of *fin de non-recevoir* was bad in law; and they also specially replied that the authority of the parishioners to bring the action was not necessary according to the law and custom of the country, and particularly according to the usage established in the parish, but that an authority given by the past and present *marguilliers* was sufficient. There were also other replications not affecting the present case.

Witnesses were examined on both sides before Mr. Justice *Berthelot*, who, on the 30th of December, 1869, decided that the evidence did establish a usage in the parish of *Verchères* to summon all the parishioners to a meeting convened for such a purpose as one for which this meeting had been holden by the *curé* and *marguilliers* alone, that such usage was not contrary to the general law, and that the Respondents were entitled to raise the question as to the want of due *autorisation*.

From this judgment there was an appeal to the Court of Queen's Bench, before which tribunal it was twice argued, and the judgment of the Superior Court was affirmed by the opinions of four Judges against one.

From these judgments the appeal has been presented to Her Majesty in Council. Their Lordships are unfortunately deprived of the written reasons of the majority of the Judges in the Court below, which have been destroyed by fire; but they have before them the judgment of Mr. Justice *Berthelot*, the notes of Mr. Justice *Caron*, and the judgment of the dissentient Judge, Mr. Justice *Monk*.

Upon the undisputed fact in the case, that the *autorisation* for the prosecution of this suit was given by an assembly composed exclusively of the old and new *marguilliers* at which the *curé* presided, the several questions of law which have been maintained were raised before the Courts below, and have been again insisted upon before their Lordships. They may be concisely stated as follows:—

First, was the *autorisation* sufficient, or, the position on which the Respondents rely, a nullity?

Secondly, if insufficient, and a nullity, was it competent to the Respondents to plead this nullity, or, in the language of the French jurisprudence, "*opposer la fin de non-recevoir*" to this action?

No question on the merits of the case has been decided in the Courts below, or is now mooted before their Lordships.

The first question, namely, was the *autorisation* sufficient, is the really important and substantial question in the case.

Their Lordships have carefully examined the various authorities which have been cited to them, as well as others upon which it appeared to them that reliance might be placed.

It seems to their Lordships proper to make at the outset a general observation upon the weight which is due to French jurisprudence and law upon the present question.

It has been urged that the *édit* of 1663, which created the "*Conseil Supérieur*" in *Canada*, required that all subsequent *édits* should be registered before they became law in this French colony, and that, therefore, the authorities derived from French law where this condition was wanting, were of little or no weight.

But their Lordships are of opinion that this proposition is too broadly stated.

It is one thing to say that an *édit* required registration before it could become positive law in *Canada*, and another thing to say that French jurisprudence relating to such *édits* can be of no avail in the construction of Canadian law or interpretation of Canadian usage.

It appears to their Lordships that, for these purposes, and so limited, the French jurisprudence has been rightly relied upon by the Courts below, and must be considered by their Lordships.

It is manifest that the early French colonists must have imported such portions of French law relating to *fabriques* as were applicable to their new position. Such portions must have constituted the foundation of the unwritten law of custom which sprung up in *Canada* before positive law was enacted in these matters for the colony. Judge *Baudry* seems to state the matter fairly in his recent work, *Code des Curés et Marguilliers et Paroissiens*, p. 2: "*Un grand nombre de ces règles dérivent d'ordonnances rendues depuis* 1663, *et qui n'ont pas eu force de loi ici, n'ayant pas été enregistrés au Conseil Supérieur de Québec; cependant, ces ordonnances sont souvent invoquées dans nos Tribunaux, du moins comme raison écrite.*" In the absence of any established usage or custom it is right to consult the authorities of great French Jurists like

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Dénisart and *Merlin;* and sometimes of French *édits*, which, though directed to a particular mission, or *paroisse*, not unfrequently, as in the case of the *Arrêt de St. Jean en Grève*, contained—as *Durande de Maillanne*, in his recital of it at length expressly points out—a summary of principles applicable to the general subject.

In the recent case of *Dame Henriette Brown* v. *Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal* (1), their Lordships had occasion to consider the character and nature of what is called "*la fabrique.*" But it may be as well to cite upon this subject the definite language of *Guyot*, Rep., tit. "*Fabrique*," Art. 24:—

"*C'est qui appartient à une église, tant pour les fonds et les revenus affectés à l'entretien ou à la réparation de l'église que pour les argenteries et les ornements.*" . . . "*désigne aussi par ce terme de fabrique, le corps ou l'assemblée de ceux qui ont l'administration des fonds et revenus dont on vient de parler.*"

It seems that, except in *Quebec*, parishes were scarcely established in *Canada* before the year 1679, and that *Verchères* was constituted a parish as late as 1722; the first appointment of *marguilliers* in that parish appears to have been in the next year; and the extracts from registers of this parish shew that the parishioners almost immediately exercised the right of choosing the *marguilliers*.

The general question, however, as to the nature of the subjects which could legally be dealt with by the *curé* and the *marguilliers* in charge, or by the *curé* and the old and new *marguilliers*, without the consent of the general body of parishioners, appears to have not been very strictly inquired into in this parish of *Verchères* before the year 1830. About that period local circumstances caused the question to be agitated. At first the ecclesiastical authorities appear to have considered that the intervention of the body of the parishioners upon almost any subject relating to the "*fabrique*" was a gratuitous concession on the part of the bishop to the parishioners—a proposition which has, indeed, in substance, been maintained by the counsel for the Appellants before their

(1) *Ante*, p. 157.

Lordships; but it is now admitted that on two occasions, at least, the convention of the whole body of the parishioners is required by law, namely, the occasions of electing new *marguilliers*, and the rendering of the accounts by the old *marguilliers*. This is said to be a concession to the parishioners since the year 1843.

The fact is, that about this period an important lawsuit was commenced, which was decided by the Queen's Bench in 1844-45.

The name of the case was *Ex parte Renouf* (1). The marginal note of the reporter is correct, and is as follows :—

"*Les notables ont droit de participer à l'élection des marguilliers.*

"*Les notables sont tous les paroissiens contribuables.*

"*Les curé et marguilliers peuvent être contraints d'appeler les notables aux assemblées pour l'élection de marguilliers, au moyen d'un writ de mandamus.*

"*Le retour fait par le curé et les marguilliers qu'ils ont offert d'admettre aux assemblées certaines personnes notables par leur état et leur rang, à l'exclusion de la généralité des paroissiens, est déclaré insuffisant et illégal.*"—*Rev. de Juris.*, 1845-46. *Banc du Roi, Quebec. Philippe Renouf. Requérant pour Mandamus.*)

After this decision it became impossible to deny that for certain purposes the consent of the parishioners was necessary, at all events in parishes in which there was not a custom to the contrary.

But the principle upon which the decision is founded is important. It is clearly to the effect that in all questions of grave consequence affecting their parish, the parishioners have a right to be consulted. This appears to their Lordships to be the true doctrine derived from the reason of the thing, and to be supported by the general analogies of the law relating to communes.

The argument that the concessions originally flowed from the bishop, and that, therefore, the parishioners have no right in the matter, is really untenable. While the revenues of the parish were derived exclusively from a portion of the *dîmes;* while the civil authority was not resorted to for the purpose of enforcing rates for the maintenance of the services and ornaments and property of the Church; while what is now known as the office of

(1) 1 Revue de Législation, p. 310.

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marguillier was unknown to the civil or municipal law, the argument might have been plausible: but since the corporation called the parish has been legally founded, and supported by civil and secular authority, every parishioner has an interest in the management of its property, and the argument is without foundation on principle.

Accordingly the books of authority, and the sentences of French Courts, greatly preponderate in favour of such rights of the parishioners as are claimed in this suit.

It is quite consistent with the existence of these rights that the *marguilliers* chosen by the parishioners should be invested with a limited power sufficient for the transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.

The law can scarcely be stated with more perspicuity than it is in the *Nouveau Dénisart* (358–9), under the title, '*Fabriques des Paroisses.*'

"*Les fabriques sont réglées dans deux espèces d'assemblées, savoir, dans les assemblées générales et dans les assemblées particulières que l'on appelle assemblée du bureau ordinaire. Dans d'autres paroisses, surtout à la campagne, il n'y a pas de bureau ordinaire. Tout ce qui est d'administration courante et journalière est dirigé par les marguilliers seuls, les affaires importantes se traitent dans les assemblées générales de la paroisse.*"

Some reference has already been made to the *arrêt* in the case of *St. Jean en Grève* delivered in 1737, which the learned canonist *Durande de Maillanne* refers to as a collection of the rules of law applicable to the rights of parishioners and the duty of *marguilliers.*

It is only necessary to refer to three of the articles of this *arrêt*:—

"Art. 20. *Sera fait en outre un état de tous les revenus, tant fixes que casuels de la fabrique, ensemble de toutes les charges et dépenses d'icelle, tant ordinaires qu'extraordinaires, &c.*

"Art. 21. *Ne sera faite aucune autre dépense par le marguillier comptable en exercice, que celle mentionnée au dit état, si ce n'est qu'il en eût été délibéré dans une assemblée du bureau ou dans une assemblée générale, ainsi qu'il sera dit ci-après.*

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"Art. 24. *Ne pourront les marguilliers entreprendre aucuns procès, ni y défendre, faire aucun emploi ni remploi des deniers appartenants à la fabrique, ni accepter aucunes fondations, sans délibération précédente de l'assemblée générale; sans préjudice néanmoins des poursuites nécessaires pour le recouvrement des revenus ordinaires de la fabrique, pour l'exécution des baux, et pour faire passer des titres nouveaux, pour raison de quoi il en sera délibéré au bureau ordinaire; et dans tous les cas du procès à intenter ou à soutenir, seront délivrées aux procureurs chargés d'occuper, des copies en forme de délibérations, soit du bureau ordinaire, soit de l'assemblée générale.*"—(*Dict. de Droit Can.: Durande de Maillanne, tit.* "*Fabrique.*")

The authority of the *Ancien Dénisart* (*vo.* "*Marguilliers*," p. 248, No. 42), is also very pertinent. He says:—

"*Des marguilliers ne peuvent intenter aucun procès ni y défendre, faire aucun emploi, ni remploi des deniers appartenant à la fabrique, ni accepter aucune fondation, sans y être autorisés par une délibération de l'assemblée générale; mais ils peuvent, sans autorisation particulière, faire les poursuites nécessaires pour le recouvrement des revenus ordinaires de la fabrique.*"

It would be useless to accumulate further authorities from French writers on this point.

It is plain that modern legislation in *Canada* has been founded upon the basis of this jurisprudence. By the *Consolidated Statutes of Lower Canada* (c. 18, s. 8,) it is enacted that—

"Whenever it is required to erect any new parish, to dismember or sub-divide any parish, or unite two or more parishes, or to alter or modify the bounds, limits, or division lines of any parish already established and erected, according to law; or when in any parish or mission it is required to construct a parish church or chapel, or chapel of ease, or a sacristy, or other appurtenance of any such church or chapel, or a parsonage-house, and the appurtenances thereof, or a churchyard, or to alter or repair the same, or any of them, in any of the said cases, on a petition of a majority of the inhabitants (being freeholders) interested in them, the erection, sub-division, dismemberment, or union of any parish or parishes, or in any alteration or modification of the bounds or limits of any

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parish, or interested in the construction, or in any alteration or repairs of any church, parsonage-house, or churchyard as aforesaid, such petition being presented to the Roman Catholic bishop of the diocese."

And section 45 enacts:—

"And for avoiding doubts as to the person who ought by law to preside at general, parish, or *fabrique* meetings for the election of churchwardens and other persons for which parish and *fabrique* meetings are by law required in the Roman Catholic parishes of *Lower Canada*—

"1. Every general, *fabrique*, and parish meeting for the election of churchwardens and other purposes, for which the law requires general meetings of the parishes and members of *fabriques* in the Roman Catholic parishes of *Lower Canada*, shall be presided over by the *curé* of the parish or the priest administering the same; and every proceeding at such meeting shall be entered in the register of proceedings of such parish in the usual manner and form, notwithstanding any usage or custom to the contrary which may have been introduced into any parishes. (23 Vict. c. 67, s. 1.)

"2. Every such parish meeting shall be summoned in the manner usual in the parish. (Ibid. s. 2.)

"3. The only persons who shall be entitled to vote at such parish meetings, when such parish meetings are necessary to the election of churchwardens, shall be the resident parishioners being householders. (Ibid. s. 3.)

"4. This question shall not affect *fabrique* and parish meetings which have been held and presided over contrary to the provisions thereof; and any proceedings which have been or shall be instituted in consequence of such meetings shall be decided as though this section had not been enacted." (Ibid. s. 5.)

The allegation that a contrary custom prevails in the parish of *Verchères* remains to be considered. At one time, no doubt, a great variety of usage and custom on this subject prevailed in *France;* and some variety has existed in *Canada.* Oral and documentary evidence with respect to the alleged custom in *Verchères* was produced before the Courts below. Their Lordships have examined the schedules and summary taken from the

Registry on this subject which form a part of the Record before them.

There are certainly some errors and omissions in these documents; but their Lordships see no reason to suppose that such errors and omissions were intentional, or that the *curé* is open to any charge of *mala fides* in this matter. But apart from this circumstance the Courts below held, and, in the opinion of their Lordships, rightly held, not only that no such contrary custom had been established by the evidence, but that a custom of summoning the parishioners on all but the ordinary occasions of the parish was proved.

The result of their Lordships' examination of the history of and authorities on the first question is, that the matter of taking legal proceedings with respect to this road, inasmuch as it affected the property of the *fabrique* and incurred the responsibility of a lawsuit, was a matter of that gravity and importance which, according to principle and authority, required the previous *autorisation* of the parishioners duly convened for deliberation on the subject; and that there is no sufficient evidence of the existence of any custom in this parish which renders the general law inapplicable to it.

The remaining question, namely, whether it was competent to the Respondents to plead this nullity as a *fin de non-recevoir* is really a question of pleading; and their Lordships would be very reluctant to interfere with the deliberate judgments of the two Canadian Courts respecting it. Their Lordships, however, have consulted various authorities on this subject, and find them to be such as fully to warrant the opinion of the judges of the Courts below.

Thus *Dalloz*, in the earlier edition of his work (*Dalloz, Juris. Gén. du Royaume, tit.* "*Fabrique des Églises*," *tom.* viii. p. 14, s. 58):—

"*Le défaut d'autorisation de la fabrique produit-il une nullité absolue? l'autorisation est-elle nécessaire pour défendre sur l'appel et pour se pourvoir en cassation? Nous nous en référons à ce que nous avons dit sur ces questions au mot* '*communes*,' *section* 2."

It is obvious that no distinction in principle upon this question

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of pleading can be taken between the cases of the *fabrique* and the commune, and, accordingly, following this reference, their Lordships find that, in his later edition of 1848, the author, under the title "*Commune*," tit. 5, c. 13, observes, first (November, 1764):—

"*Effet de défaut d'autorisation à l'égard de la commune.—Le défendeur poursuivi par une commune non autorisée à cet effet peut envoyer devant l'autorité judiciaire une fin de non-recevoir tirée de l'incapacité de son adversaire, et les tribunaux doivent accueillir cette exception, alors qu'elle est justifiée.*"

Further on, in paragraph 1779, he considers:—

"*Effet du défaut d'autorisation à l'égard de l'adversaire de la commune.—Si le défendeur actionné par une commune non autorisée, soit par suite d'un refus du Conseil de Préfecture, soit parce qu'elle aura négligé de s'adresser à ce Conseil, oppose la fin de non-recevoir, tirée de cette violation des formes, la commune doit être déclarée non-recevable.*"

Dalloz examines at length the question whether, if "*"la fin de non-recevoir"* has not been invoked, the adversary of the "*Commune*" can avail himself of the nullity resulting from the defect of "*autorisation.*" He observes that there have formerly been three schools of opinion upon this subject. According to one school this defect produced an absolute nullity, and could be alleged at any stage of the cause, even before the Court of Cassation. According to the second school, the exception must have been taken before the Judges of first instance.

Between these two schools of opinion came the third, of which *Merlin* was, in fact, the founder, and which ultimately triumphed. This distinguished French jurist arrived at the conclusion that the objection must have been taken before the case reached the Court of Cassation, either before the Judges of the first or second instance.

This has now become the law of *France*, and the whole matter is thus summed up by *Dalloz*:—

"*Ainsi et pour résumer ce que nous venons de dire, le pourvoi en cassation, fondé sur ce défaut d'autorisation, ne peut être ouvert à l'adversaire de la commune qu'autant que ce moyen a été proposé en*

première instance ou en appel; mais il peut être invoqué devant les juges du second degré, quoiqu'il ne l'ait pas été en première instance, à moins que la partie n'y ait renoncé expressément ou tacitement." (Par. 1786.)

Merlin, in his "*Répertoire de Jurisprudence*," *tit.* "*Nullité*," § 2, "*Par qui les nullités peuvent-elles être alléguées*," says:—

"1. *On distingue, sur cette question, deux sortes de nullités, l'une absolue, l'autre relative.*

"*La première peut être alléguée par toutes sortes de personnes; la seconde ne peut l'être que par ceux en faveur de qui elle a été prononcée.*

* * * * * * *

"*Cette nullité* [namely, the first] *peut être objectée, non-seulement par la partie publique, mais encore par toutes sortes de personnes, sans qu'on puisse leur opposer qu'elles se prévalent du droit d'un tiers; et le juge peut y prendre d'égard d'office quand personne ne la proposerait.*"

And so M. *Rolland de Villargues*, in his comparatively recent work "*Dictionnaire du Droit Civil*," *tit.* "*Autorisation pour plaider*," observes:—

"*Le défaut d'autorisation peut être opposé par toutes les parties, et même d'office, en tout état de cause: et il vicie tous les actes de la procédure d'une nullité radicale. Il s'agit ici d'une formalité qui est d'ordre public et substantielle.*"

A category which embraces the present case.

"*Le point*," this author adds, "*est constant*," and he refers to several judgments of the Court "*Cassation*" in support of his opinion.

Other authorities might be cited to the same effect.

Upon the whole, their Lordships are of opinion that upon both questions the Canadian Courts have come to a right decision, and that this appeal ought to be dismissed with costs. And they will humbly advise Her Majesty to this effect.

Attorneys for the Appellants: Messrs. *Bischoff, Bompas, & Bischoff.*

Attorney for the Respondent: Mr. *J. T. Simpson.*

J. C.* 1875 *May* 4, 5, 6, 7, 8; *June* 22.

THE ATTORNEY-GENERAL OF VICTORIA . APPELLANT;

AND

JOHN ETTERSHANK . . . . . RESPONDENT.

AND THE CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

6 Apps Cas 631

Victoria Land Acts—Crown Remedies and Liability Statute, 1865—*Forfeiture of Lease—Waiver—Right to the Grant in Fee of an Allotment—Specific Performance—Notice of Forfeiture under sect.* 101 *of Land Act*, 1869.

On the 29th of June, 1865, *S.*, who as holder of a certificate under the *Land Act*, 1862, was entitled to a right of selection under sect. 7 of the *Amending Land Act*, 1865, exercised that right, and selected an allotment of land, of which, after payment of a year's rent, he was put into possession, subject, according to the Act of 1862, to "the usual covenant for payment of rent, and a condition for re-entry on non-payment thereof." He failed to cultivate, build, or inclose within the year, as required by the 36th section of the *Land Act*, 1862; and although some subsequent rent was received, this allotment was, on the 16th of April, 1869, declared to be forfeited for "non-payment of rent, non-compliance with the provisions, and non-performance of covenants," incident to the tenure under the Act.

In 1872 *E.* purchased the allotment from *S.*, having previously received an assurance from the Government that it would receive the back rent and issue the lease. The lease was subsequently executed by the governor, and issued to *S.*, dated in conformity with sect. 11 of the *Land Act*, 1862, on the 29th of June, 1865, the day on which *S.* became entitled as selector to have it. *E.* thereupon completed his purchase, and on the 30th of July, 1872, registered his title, and obtained a certificate thereof under the *Transfer of Land Statute*. Subsequently the Government refused to receive the back rent when tendered by *E.*

In a suit by *E.* by petition of right under the *Crown Remedies and Liability Statute*, 1865, claiming to be entitled to the grant in fee simple of the said allotment, as the registered proprietor of the lease as aforesaid, the Government contended that the lease to *S.*, or the right to it, was forfeited and became absolutely void, (*a*), by non-improvement within a year; (*b*), by non-payment of rent; (*c*), by breaches of covenant as above. *E.* replied that the forfeiture could be and was waived, (*a*), as to non-improvement and other breaches of covenant, by subsequent receipt of rent, and by issuing the lease to *S.*; (*b*), as to non-payment of rent, by issuing lease to *S.*; otherwise, that he was entitled in equity to relief against the forfeiture:—

Held, that, having regard to sect. 22 of the Act of 1862, the forfeiture

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

was capable of being waived, and was, in fact, waived by the subsequent acceptance of rent, and by the issuing of the lease to *S.* Notwithstanding that such lease was, under sect. 11 of the said Act, dated before the forfeiture occurred, it operated to affirm the tenancy, of which it waived the forfeiture, together with all interests springing therefrom, including the right to a grant of the fee. Otherwise, and if there had been no waiver, the lessee in possession was entitled, both under the Act and the terms of the lease, to relief in equity against the forfeiture for non-payment of rent, and to a decree for specific performance, upon proper terms, of the statutory contract.

Keating v. *Sparrow* (1) distinguished.

Persons entitled to exercise rights of selection under sect. 7 of the *Amending Act* of 1865 are liable to the penalty imposed by sect. 126 of the Act of 1862.

Sect. 101 of the *Land Act* of 1869 must not be construed so as to make notice in the *Gazette* evidence not only of a forfeiture, but also of the right to forfeit, in cases where no substantive power had been previously given to the governor to declare a forfeiture, nor any corresponding provisions made for enabling lessees to shew cause against the exercise of such a power.

Quære, whether this section applies to leases issued after the Act has come into operation.

Quære, as to the effect of the certificate of title obtained by *E.* under the *Transfer of Land Statute.*

The claim in this petition of right arises out of a contract with Her Majesty within the meaning of sect. 27 of the *Crown Remedies and Liability Statute*, 1865, since the right to the grant of the fee, although created by statute, is conferred upon the holder of a lease, as a statutory right annexed to the lease and an implied term of the contract.

THESE and the following cases were seven appeals from decrees of the Supreme Court of the Colony of *Victoria*, in five suits brought against the Attorney-General of the Colony, by persons claiming to be entitled to grants in fee simple of land under the Colonial Land Acts. The arguments therein were heard consecutively, and on a later day the judgments were pronounced.

The first of these five suits gave rise to the two above-mentioned cross appeals. The facts of the case and the nature of the suit are detailed in the judgment of their Lordships. The petition of right therein mentioned was dismissed by Mr. Justice *Molesworth* on the 10th of March, 1873, which dismissal was reversed by the Supreme Court (*Barry*, C.J., *Williams* and *Fellowes*, JJ.) on the 30th of September, 1873. The Respondent *Ettershank* was thereby

(1) 1 Ball & Beattie, Ir. Ch. Rep. 367.

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declared entitled to the benefit of a lease granted under the Colonial Land Acts, and dated the 29th of June, 1865, and to the right of purchasing the fee simple of the land comprised therein, provided he paid the rent due with interest at the rate of 8 per cent. per annum, and the penalty of 5*s.* per acre imposed by sect. 98 of the *Land Act*, 1869, within three months. In default of payment the petition was to stand dismissed with costs; but on payment or tender of the rent and penalty within the time aforesaid, the Attorney-General was directed to pay the costs of the Respondent *Ettershank*.

Mr. *J. F. Stephen*, Q.C., and Mr. *Kekewich*, for the Attorney-General of *Victoria* :—

The grant of the lease after the forfeiture of the tenancy was not a waiver of the forfeiture. The lease was granted in 1872, but dated in 1865, and by sect. 11 of the *Land Act* of 1865 must be construed as granted in 1865. Having regard to its terms, and especially to the clause for re-entry contained therein, the utmost effect which can be given to it is that *Ettershank* was placed in the same position as if it had been granted to *Strong* in 1865, that is, instead of having no lease he had obtained a void lease. Otherwise the lease imposed conditions which could not be fulfilled; the clause of re-entry, which is an essential part of it under the statute, would be unmeaning and the lease itself an absurdity. Grants from the Crown are not, like grants from private persons, construed strictly against the *grantor;* and moreover this was a third species of grant, viz. a grant under a legislative enactment, and therefore one the terms of which were considered in the interests of the public, and the rule of construction adopted must be influenced by that circumstance. The lease in its plain meaning was voidable at the option of the Government for the breaches of covenant which were committed, and the Government exercised that option; and the lease, which speaks from 1865, was declared to be forfeited by the notice in the *Gazette* of April, 1869. There is no title in equity to relief against this forfeiture, which it is contended has not been waived. Equity does not grant relief against provisions of a statute, or against those provisions of a statutory lease which have been introduced by the express direction of the Legislature.

The principle upon which Equity grants relief against forfeiture in cases like the present is stated in the following cases: *Keating* v. *Sparrow* (1); *Peachy* v. *Duke of Somerset* (2); *In re Brain* (3). Relief is not given except against forfeiture for non-payment of rent: *Hill* v. *Barclay* (4); *Bowser* v. *Colby* (5); *Gregory* v. *Wilson* (6); *Nokes* v. *Gibbon* (7).

The Court should not go behind what is declared to be conclusive evidence of forfeiture, sect. 101 of the *Land Act* of 1869: *Peel's Case* (8); see also *Pain* v. *Coombs* (9).

Equity would not give relief in ordinary tenancies against forfeiture except within a reasonable time: see the terms of 4 Geo. 2, c. 28, and the Colonial *Common Law Procedure Act*, No. 274, of 1865, sects. 177, 188. A forfeiture incurred in 1869 will not be relieved against in 1872.

There is no title to specific performance in this case, nor is there any contract which could be enforced under the *Crown Remedies and Liability Statute*, 1865. There is no occasion to decree specific performance where the Plaintiff can be put in the same position as he was before the contract; and in this case *Ettershank* has not paid a farthing to the Crown, and he has got what he bargained for, viz. a void lease. They referred to *Fry* on Specific Performance [Ed. 1858], p. 275, s. 623; *Spence* Eq. Jur. vol. i. § 630; *Johnson* v. *Shrewsbury and Birmingham Railway Company* (10). Any lease ordered by this Court must be granted under the *Land Act* of 1869 (see sect. 4), and not otherwise, and must contain similar covenants to those the antecedent breach of which have forfeited the lease granted in 1872. As to the questions in the cross appeal, they contended that interest was properly chargeable on arrears of rent from the time when such rent ought to have been paid. Under the 98th section of the *Land Act*, 1869, no Crown grant could properly be made to the Appellant, except under the penalty imposed by the order of the Supreme Court.

(1) 1 Ball & Beattie, Ir. Ch. Rep. 367; see especially p. 373.
(2) 1 Strange, 446; see p. 453.
(3) Law Rep. 18 Eq. 389; see p. 410.
(4) 16 Ves. 402; 18 Ves. 56.
(5) 1 Hare, 125.
(6) 9 Hare, 683.
(7) 3 Drew. 681.
(8) Law Rep. 2 Ch. 674; Law Rep. 2 H. L. 362.
(9) 1 De G. & J. 34.
(10) 3 D. M. & G. 914.

3 Jur. N.S. 726
3 Jur. N.S. 847.
17 Jur. 1015.

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Mr. *Cotton*, Q.C., and Mr. *Ince*, for *Ettershank*:—

Under the provisions of the various Land Acts of the colony the grant of the lease in 1872, and the registration of *Ettershank's* title under the *Transfer of Land Statute*, operated to vest in him, subject only to the due payment of the rent then due and to accrue due (which payment he was ready, willing, and offered to make), the right to have his title completed by the grant of the fee simple in the allotment comprised in the lease. Assuming that the tenancy had been forfeited before the grant of the lease in 1872, the issuing of such lease was in itself a waiver of any and every forfeiture theretofore committed. Even if there had been no waiver, still *Ettershank*, in 1872, went to the head of the Government department, and received from him the assurance that he could and would receive the back rent and issue the lease. *Ettershank* purchased on the faith of such assurance, and the Government cannot now be heard to contend that it granted a void lease, after its own representation that it would issue a lease for an existing interest, which *Ettershank* might safely purchase. Not merely was the issuing of the lease, even without the representation which accompanied it, a waiver of the forfeiture, but the mere receipt of rent by the proper officer of Government, with notice of a forfeiture previously committed, was itself a waiver. As to non-payment of rent working a forfeiture, it was the case of a penalty in respect of which a contract had intervened. Although a statutory penalty, it was annexed to a contract. Courts of Equity consider clauses of re-entry as intended to secure payment of the rent, and such was the true construction and effect of the clause in the present case: *Keating* v. *Sparrow* (1). Down to 4 Geo. 2, the Courts of Equity acted without any limits as to time. [They referred to *In re Brain* (2), and to *Peachy* v. *Duke of Somerset* in 2 *White* and *Tudor's* Leading Cases, p. 1082, and the statute of 4 Geo. 2, therein referred to, with the note thereon: see 15 & 16 Vict. c. 76, and Victorian Statute, No. 274, of 1865, s. 177.] The notice of forfeiture in the *Gazette* purporting to be made under sect. 101 of Act 360 of 1869, could not avoid a lease granted in 1872; and moreover was not issued under any statutory authority at all, for the section does

(1) 1 Ball & Beattie, 368; see p. 374. (2) Law Rep. 18 Eq. 389.

not apply to this case, the Government not having been authorized by any previous Act to declare a forfeiture with respect to cases like the present. It could not operate as a mere publication to the tenant that the lease had been avoided under its ordinary provisions; the alternative would be to regard it as an exercise of arbitrary power conferred by a retrospective law, and sect. 101 will not be so construed as to authorize or validate such proceeding: *M'Dowell* v. *Myles* (1). So long as there is a valid and subsisting lease the holder has a right to pay the purchase-money and obtain a grant of the fee. The Land Acts of 1862 and 1865 have affixed to the lease a contract to that effect, and *Ettershank* is entitled to a specific performance of it: *Hall* v. *Cazenove* (2); *Bridges* v. *Longman*, which was a case of a Crown lease (3). And as to the question of delay in coming for specific performance, see *Moss* v. *Burton* (4); *Davenport* v. *Walter* (5).

As regards the cross appeal, interest on rent in arrear is not due either under the *Land Act*, 1862, the *Amending Act* of 1865, or the lease. The penalty of 5*s*. per acre, for non-compliance with the provisions of s. 36 of the former Act, does not apply to persons who select under the latter Act. It is contrary, moreover, to the equity of the 126th section of the *Crown Lands Act*, 1862, that the Crown should seek to enforce the penalty, after the Crown, through the Board of Lands and Works, by accepting rent, and issuing the lease, had condoned the non-performance by *Strong* of the obligations imposed by the 36th section.

Mr. *J. F. Stephen*, Q.C., in reply:—

As regards the representation made by Mr. *Grant*, the head of the Government department, to *Ettershank*, if *Grant* were the lessor, and *Strong* the lessee, that representation would be of serious import. It is contended that these leases rest upon legislation of which every one must be aware, and that Mr. *Grant* had no power to alter that legislation by his representations. The lease of 1872 must be taken, under the Act, as granted in

(1) Vict. Sup. Court Rep., Cases at Law, vol. vi. part i. p. 16.
(2) 4 East, 477.
(3) 24 Beav. 27.
(4) 13 L. T. (N.S.) 623.
(5) Unreported, interim injunction recently granted by Vice-Chancellor *Malins*.

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1865, and then a complete construction can be put upon it. The forfeiture for non-payment of rent immediately ensued, and was waived. In 1869 the forfeiture was insisted upon, and then *Ettershank* buys, and Mr. *Grant*, under mistake of law, gives the lease.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

These cross appeals are the first of a series of seven appeals to Her Majesty from decrees of the Supreme Court of the colony of *Victoria* in several suits brought against the Attorney-General of the colony, representing the Queen, by persons claiming to be entitled to grants of land under the Colonial Land Acts.

The suit which gives rise to the two cross appeals first to be considered was commenced by a petition of right on the equity side of the Court under the Colonial Act the *Crown Remedies and Liability Statute*, 1865. By this petition, the suppliant, *John Ettershank*, claimed to be entitled to the grant in fee simple of an allotment, as the registered proprietor of a lease from the Crown issued under the Colonial Land Acts to *Henry Strong*.

The Acts to be considered are the *Land Act*, 1862 (which consolidated and amended the laws relating to the sale and occupation of Crown lands), the *Amending Land Act*, 1865, and the *Land Act*, 1869.

By the Act of 1862 lands were to be set out "in agricultural areas" for selection. A scheme was provided by which any person becoming the selector of an allotment might purchase at once the fee of the whole upon payment of the price of £1 per acre, or might purchase at once the fee of one moiety only, and receive a lease of the other moiety for a term of eight years, at a yearly rental of 2*s.* 6*d.* per acre; and upon full payment of this rent, being, in fact, the purchase-money for what the statute calls "the remaining moiety," the selector was entitled, at the end of the eight years, or at any intermediate time, if the rent was all paid in advance, to a grant in fee of this moiety.

The following are the material sections on this point:—

"XXI. Every selector of any such allotment shall be entitled

either to purchase the fee of the whole allotment at the price of one pound for each acre or fractional part of an acre therein, or to purchase in like manner and at like price the fee of one moiety thereof, and receive a lease of the remaining moiety on the terms herein contained.

"XXII. Every such lease shall be for a term of eight years, at a rent payable yearly in advance of two shillings and sixpence for each acre or fractional part of an acre so demised, and shall contain the usual covenant for the payment of rent, and a condition for re-entry on non-payment thereof; and upon the payment of the last sum due on account of the rent so reserved, or at any time during the term upon payment of the difference between the amount of rent actually paid and the entire sum of one pound for each acre, the purchaser of the first moiety, his heirs or assigns, shall be entitled to a grant of the remaining or leased moiety as real estate, and the enrolment on record of the grant of the remaining or leased moiety shall have relation back to, and shall take effect from, the time when the grant of the first moiety took effect."

It is said that the Crown was desirous to benefit purchasers under former *Land Acts*, who had bought allotments at a high price, by allowing them to select further land on the same terms as selectors under the Act of 1862 were to hold the leased moiety of their allotments. Whatever may have been the policy, the statute of 1862 certainly gave to former purchasers this new right.

Section 23 is as follows:—

"XXIII. Every person, not being a mortgagee, seised at law of, or seised of an equity of redemption in, lands in fee simple within the colony of *Victoria* purchased previously to the coming into operation of this Act, shall be entitled to select an allotment of Crown lands in any agricultural area, and hold the same under lease on the same terms and in the same manner as hereinbefore provided for selectors of land in an agricultural area, and the payment of one year's rent shall constitute such person the selector of such land, provided the quantity to be selected shall not exceed in extent the land of which he is so seised, and in no case shall the

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said land so selected exceed three hundred and twenty acres; provided that no person shall be entitled to become a selector under this section unless he shall apply for this purpose within twelve months from the date of this Act."

It was by virtue of this enactment (extended as to time by sect. 7 of the Act of 1865, hereinafter set out) that *Strong* became a selector, and obtained the lease which the suppliant *Ettershank* afterwards purchased.

Section 36 enacts as follows:—

"XXXVI. Every selector of an allotment as aforesaid, within one year after he becomes a selector, shall cultivate at least one acre out of every ten acres thereof, or shall erect thereon a habitable dwelling, or shall inclose such allotment with a substantial fence."

And the following clause is contained in Part VI. of the Act, headed, "Trespasses and Penalties":—

"CXXVI. If any selector of an allotment in any agricultural area under this Act shall not within one year from the time of his having become the selector of the same, cultivate at least one acre out of every ten thereof, erect thereon a habitable dwelling, or inclose the said allotment with a substantial fence, he shall forfeit a penalty at the rate of five shillings for every acre comprised in such allotment; but no proceedings to recover such penalty may be taken, except by some person authorized in that behalf by the Board of Land and Works."

Section 11 of this Act is as follows:—

"Notwithstanding any law or usage to the contrary, all Crown grants and leases which are issued after the commencement of this Act shall bear date on the day when the persons named therein as grantees or lessees respectively, first became entitled to such grants or leases, and shall be of the same force and validity as if they had been enrolled on the day on which the same bear date."

The 7th section of the *Amending Land Act*, 1865, provides that "former purchasers" entitled to select under sect. 23 of the Act of 1862, and who had not done so within the twelve months

mentioned in that Act, might exercise such selection within twelve months after the passing of the Amending Act; but "subject to all the limitations, conditions, restrictions, and obligations attached by the said Act (1862) to such selection and purchase." . . . . "Provided that the Board of Land and Works may from time to time make such regulations as may be thought necessary or expedient for the purpose of enforcing the conditions and obligations aforesaid, or of preventing the violation or evasion of any of the provisions of the *Land Act*, 1862."

The *Land Act*, 1869, contains the following clauses:—

"98. Whenever a penalty has been incurred by any person under the one hundred and twenty-sixth section of the *Land Act*, 1862, or the seventh section of the *Amending Land Act*, 1865, it shall be lawful for the governor to demand and receive the amount of such penalty in addition to the purchase-money, before issuing a Crown grant of any allotment in respect of which such penalty has accrued to such person or his assignee: Provided that no Crown grant of any such allotment shall be issued unless the person applying for such grant shall have proved to the satisfaction of the board, to be certified under its seal, that the provisions of the thirty-sixth section of Act No. 145, or the seventh section of the *Amending Land Act*, 1865, as the case may be, have been fully complied with in respect of such allotment, or in default of such certificate shall have paid a penalty at the rate of 5*s.* for every acre of such allotment.

"101. All notices heretofore published in the Government *Gazette* purporting to declare that the governor had revoked, forfeited, or declared void, any lease or license issued under any of the Land Acts heretofore in force, or either of them, shall be received in all Courts of justice as conclusive evidence that the lease or license was lawfully revoked, forfeited, or declared void, as the case may be."

The facts are these:—On the 29th of June, 1865, *Strong*, who was a "former purchaser" within the meaning of the 7th section of the *Amending Act*, 1865, and who availed himself of the extended time allowed by it, selected the allotment in question, containing about seventy-six acres, paid a year's rent in advance, and was put

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into possession. He failed to cultivate, build, or inclose within the year, as required by the 36th section of the Act of 1862. This omission was reported by the Crown Lands' bailiff to the Board of Land and Works, and subsequently, with knowledge of this report, the rents for the second and third years were received from *Strong* by the proper land officers of the Crown, the last payment being on the 1st of April, 1868.

No further rent was paid. On the 16th of April, 1869, the following notice was published in the *Victoria Government Gazette*:—

"Allotments forfeited for non-payment of rent, &c., under section 7 of the *Amending Land Act*, 1865. It is hereby notified that the leases of the several allotments specified in the schedule hereunto annexed have been by the Governor in Council declared forfeited for non-payment of rent, non-compliance with the provisions, and non-performance of covenants in the respective leases under the above section."

The schedule contained the allotment in question, and *Strong's* name as lessee.

In this state of things the suppliant, *Ettershank*, entered into a treaty for the purchase of the allotment from *Strong*, or from persons claiming under him; but before concluding an agreement, he had an interview with Mr. *Grant*, the President of the Board of Lands and Works. This took place in April, 1872. The substance of what passed was, that *Ettershank* told Mr. *Grant* of his wish to purchase, if he could do so with safety, and asked if the Government would take the back rent and issue the lease. Mr. *Grant* desired time to make inquiries, and on a second interview told *Ettershank* that he found the land had been gazetted as forfeited some years ago, but there was nothing to prevent his taking the back rent and issuing the lease, and that he would do so. *Ettershank* on that assurance said he would purchase, and Mr. *Grant* gave instructions for the lease.

In July, 1872, the lease was executed by the governor and issued. It is dated, in conformity with sect. 11 of the Act, 1862, on the 29th of June, 1865, the day on which *Strong* became entitled, as selector, to have it.

The lease purports to be from the Queen to *Strong*. After

reciting that, "under the 23rd and 24th sections of the *Land Act*, 1862, and the 7th section of the *Amending Land Act*, 1865, the lessee has become entitled to receive a lease of the land, and paid in advance one year's rent," it contains a demise of the land for the term of eight years, reserving a yearly payment of 2*s.* 6*d.* per acre; and a proviso of re-entry in case of non-payment of rent, or failure to cultivate, build, or inclose within a year."

This lease having been issued, *Ettershank* completed his purchase, and on the 30th of July, 1872, registered his title, and obtained a certificate of title under the *Transfer of Land Statute*. This certificate states that *Ettershank* "is now the proprietor of a leasehold estate for eight years from the 29th of June, 1865," in the piece of land, describing it, "being Crown allotment."

Ettershank has since been in possession of the allotment.

Soon after the lease had been issued, Mr. *Grant* ceased to be President of the Land Board, and was succeeded by Mr. *Casey*, who refused to receive the back rent when tendered by *Ettershank*, and disputed his title to the allotment and to a grant of the fee.

In his petition in this suit the suppliant offers to pay the back rents and penalties for non-improvement, but submits he is not liable for the latter, which raises one of the questions in the cross appeal.

The defence on the part of the Crown is that the lease to *Strong*, or the right to it, was forfeited—

(1.) By non-improvement within a year; and,

(2.) By non-payment of rent.

And, moreover, that by force of sect. 101 of the *Land Act*, 1869, the notice published in the *Gazette* is conclusive evidence that the lease was lawfully forfeited.

It is further contended that the breaches of covenant above referred to are an answer to a suit for specific performance.

On the part of the suppliant it is answered that the Crown cannot now rely on these causes of forfeiture because—

(1.) The breach of the condition to improve was waived by the subsequent receipt of rent, and also by issuing the lease to *Strong*; and,

(2.) The non-payment of rent was waived by the lease issued to

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Strong; and if not, because a Court of Equity would relieve against a forfeiture on that ground.

It is further insisted that the certificate of title under the *Transfer of Land Act* is conclusive as to the suppliant's right to the lease.

The effect sought to be given to the notice in the *Gazette* by the operation of sect. 101 of the Act of 1869 is also denied.

It will be convenient, in the first place, to consider this last point.

The sect. 101 applies only to notices "heretofore published." Its history appears to be this:—

By the 15th section of the Act of 1865, certain classes of persons were prohibited from becoming lessees or assignees of allotments of agricultural lands; and it was provided that if any person in violation of this prohibition became a lessee or assignee, the governor in council might "declare the lease to be forfeited;" and upon publication of notice of such declaration in the *Gazette*, the term created by the lease should cease and determine, and the allotment might be resold or leased.

The Supreme Court of *Victoria* held that the operation of this section, and of the 26th section of the *Statute of Evidence*, 1864, was to make the *Gazette* evidence only of the declaration of a forfeiture, but not that the right to declare such forfeiture had arisen: *Macdowell* v. *Myles* (1).

The Act of 1869 was passed soon after, and it is said in consequence of this decision, and the effect of sect. 101, in all cases to which it applies, no doubt is to make notice in the *Gazette* conclusive evidence that the lease or license was lawfully forfeited.

It is contended for the suppliant that the section applies only to cases where power has been given to the governor by previous legislative enactment to declare, of his own will, a forfeiture, as in the cases comprised in the above-mentioned sect. 15 of the Act of 1865. Their Lordships agree with this view. It is conceded that no power of this kind had been given with respect to leases like the present, and they think it ought not to be presumed, without plain words, that the Legislature intended, by a retro-

(1) 6 W. W. & A'B. 16.

spective law, to give to the governor an arbitrary power to declare void existing leases, especially such as the present, where the lessees are, in fact, inchoate purchasers of the fee, who, when this Act passed, might have paid all, or nearly all, the instalments of the purchase-money. The words of the section, "any lease or license issued under any of the Land Acts" are no doubt large; but they should be read with reference to the subject matter, and the object of the legislation; and on reading them, their Lordships think they may be properly limited to the cases where a substantive power to declare a forfeiture had been previously given to the governor.

Other sections of the Act of 1869 were referred to by the learned counsel for the Crown with a view to shew that the Legislature intended by this Act to give a large discretionary power to the governor. But these when looked at furnish reasons for the limited construction of sect. 101. Sect. 20 (like sect. 15 of the Act of 1865) prohibits certain persons from becoming licensees, and, in case of a violation of the prohibition, enables the governor to declare the license to be forfeited; and then, upon publication of notice in the *Gazette* the interest is to cease. Again, sect. 22 enables the governor, on certain things being proved to his satisfaction, to revoke licenses and resume possession of the lands, providing for notice in the *Gazette* of such revocation.

It thus appears that in the cases embraced by these sections, which it is to be observed extend to licenses only, substantive powers to forfeit and revoke are expressly given to the governor.

Then by sect. 100 it is provided, that all persons whose leases or licenses under that or former Acts are deemed liable to forfeiture, except for non-payment of rent or fees, should be allowed to shew cause to the minister against such forfeiture, and that their cases should be publicly heard.

From the manner, therefore, in which forfeitures are dealt with in the above clauses, it is unreasonable to presume that sect. 101 was intended to make notice in the *Gazette* evidence not only of the forfeiture, but of the right to forfeit, in the cases where no substantive power had been given to the governor to declare a forfeiture, nor any provision made for enabling the lessees to shew cause against the exercise of such a power.

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It is stated in the judgment of the Supreme Court that it was conceded by the Attorney-General that this enactment did not confer any new power, but merely gave to the *Gazette* notice greater efficacy as evidence than it previously possessed. Their Lordships cannot in a question of construction rest upon this concession, nor did the Supreme Court act upon it, for the Judges gave their own reasons for coming to the decision, in which their Lordships agree, that the section is inapplicable to the present case.

It was further argued that, in any view, the section could not affect a lease issued after the Act came into operation. But the construction which their Lordships have given to the clause renders it unnecessary to determine this point, or the question of the effect of the certificate of title obtained by *Ettershank* under the *Transfer of Land Act.*

The questions to be next considered are, whether the forfeitures have been waived.

It was contended for the Crown, in the first place, that these forfeitures made the lease absolutely void, and incapable of being affirmed by any act of waiver.

Their Lordships are unable to concur in that view. So far as the obligation to improve depends on the statutes, it is nowhere enacted that the non-fulfilment of it shall avoid the lease. A penal sum is in such a case to be paid, and the 98th section of the Act of 1869, which makes the payment of such penalty, when incurred, a condition precedent to a grant of the fee, is conclusive to shew that the Legislature did not treat the breach of the obligation to improve as being, *ipso facto*, an avoidance of the lease. Then, so far as the obligations to improve and pay rent, and the liability to forfeiture, are governed by the lease, any breach of these obligations, in their Lordships' opinion, would render the lease voidable only, and not void. There can be no doubt that this would be the construction of the condition for re-entry in a lease from a private person, and they think the construction cannot be different in the case of a lease of this kind from the Crown. It was held by the Master of the Rolls to be clear that a forfeiture incurred by a lessee under such a condition of re-entry contained in a Crown lease, was waived by the receipt of subsequent rent:

Bridges v. *Longman* (1). It is to be observed that what the statute directs to be inserted in the lease is a condition for re-entry, and not a condition making the lease void.

Assuming, then, the condition of re-entry made the lease voidable only, their Lordships cannot doubt that with regard to the failure to improve within a year, this ground of forfeiture was waived by the subsequent receipt of rent. It appears that the proper land officer received the second and third year's rent, with full knowledge of the failure to improve, and their Lordships see no reason for not attributing to these acts the ordinary consequence of affirming the tenancy.

Then with regard to the forfeiture occasioned by the failure of *Strong* to pay the subsequent rent, it was contended that it was waived when the lease was executed and issued at *Ettershank's* instance in July, 1872. It was answered for the Crown that, inasmuch as the statute requires that the lease, whenever issued, shall bear date on the day when the selector became entitled to it, and shall be of the same force as if enrolled on the day of its date, that not only must it be taken to speak from that date, but it must be assumed that it was then issued. It was also argued that the intention in issuing it was not to affirm an existing tenancy, but to give the selector the lease to which he was at one time entitled, so that he might avail himself of his rights (if any) under it, but without admitting that any such rights existed.

Their Lordships cannot concur in these views. They are of opinion that the fact of issuing the lease, under the circumstances of the present case, operated as a waiver of previous forfeitures. Upon the assumption that the right of the selector had been determined by forfeiture, his interest would have been extinct, and the Crown could not have been required at his instance to execute a lease. When, therefore, the governor executed and the proper officer issued the document, it must be presumed that it was intended to waive any forfeitures, and to affirm an existing tenancy. Moreover, in the present case, the argument that it was meant to issue a lease simply for what it might be worth, can have no foundation; for it is not denied that *Ettershank*, on applying for the lease, was led to believe by the President of the Land Board

(1) 24 Beav. 27.

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that it would be issued for an existing interest, which he might safely purchase.

It was further contended for the suppliant that, if there had been no waiver, equity would relieve against the forfeiture for non-payment of rent; whilst, on the other hand, it was insisted for the Crown, that these interests, being in Crown lands, and governed by statutory regulations, the ordinary relief afforded by the Court could not be granted. As this question arises in the other appeals, as well as in the present, it will be convenient to consider it in this place.

The argument for the Crown was that, in giving relief, the Court proceeds on the presumption that the condition of forfeiture is intended merely as security for payment of the rent; and it was said that this presumption cannot be made in the case of conditions imposed by a statute. This would be so, where a statute, either expressly or by necessary implication, annexes a condition to an estate, making it determinable on non-payment of rent, without more. But that is not the present case. What the Act of 1862 authorizes and prescribes in the case of a selector, is that he shall receive "a lease," and by sect. 22 such lease is to contain "the usual covenant for payment of rent, and a condition for re-entry on non-payment thereof." When, therefore, the statute authorizes a lease with these usual and well understood-provisions, it is reasonable to suppose that the Legislature intended that it should operate as a contract of the like nature made between private persons. The statute does not direct that the lease should contain a condition making the lease void on non-payment; and there is nothing to indicate that it meant the condition of re-entry to have a more stringent effect, or to be regarded otherwise than the like condition in ordinary leases.

The principal case cited by the counsel for the Crown, *Keating* v. *Sparrow* (1), is not opposed to this view. In that case a tenant for lives with power to renew a life within six months, having allowed the time to expire, applied for relief against this lapse. The statute of the 19 & 20 Geo. 3, c. 30, which directed Courts of Equity in certain cases to grant such relief, contained this important provision:—

"Unless it be proved to the satisfaction of the Court that the

(1) 1 Ball & Beattie, Ir. Ch. Rep. 367.

landlords entitled to receive fines had demanded such fines, and the same had been refused or neglected to be paid within a reasonable time after such demand."

The fine having been demanded and not paid within a reasonable time, Lord *Manners* held he had no power to relieve the tenant. His decision could scarcely have been otherwise. The statute which gave a right to relief, beyond that ordinarily granted by the Court, in favour of tenants in some cases, restrained the power of the Court in favour of landlords in others. Lord *Manners* said:—

"After a demand by the landlord, the provisions of the statute apply, it then ceases to be merely a contract between the parties, and comes within the opinion of Lord *Macclesfield*, that relief cannot be given against the provisions of the law."

To have given relief in the case cited would have been opposed to the clear provisions and intention of the statute, and Lord *Manners* consequently held that any equitable authority that might have existed independently of the Act could not be exercised. That case bears no analogy to the present, where the statute provides for a contract of lease, with, as before observed, usual and well-understood covenants and conditions.

Another case of *In re Brain* (1), was cited on the part of the Crown, for the sake of some observations of Vice-Chancellor *Malins*. In that case the learned Vice-Chancellor said he was very much inclined to decide the question then before him (the forfeiture of a gale in the *Forest of Dean*) upon the ground referred to in *Keating* v. *Sparrow* (2), viz., that the rights were statutable rights, and that if properly exercised the Court as against the Crown could not give any relief. This dictum of the learned Vice-Chancellor was not necessary to the determination of the case, which he decided on other grounds, and was based on his construction of the *Forest of Dean* Acts and the grants under them. These Acts, although bearing some resemblance to the Colonial Land Acts, relate to mining grants and special customs, and are not so analogous to the enactments in question that the observations of the Vice-Chancellor would govern the question

(1) Law Rep. 18 Eq. 389. (2) 1 Ball & Beattie, Ir. Ch. Rep. 367.

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now under consideration, even if they had formed the ground of the decision.

The contention of the Crown, that a decree for specific performance ought not to be granted when breaches of the conditions of the contract have been proved, cannot, in their Lordships' view, prevail, when it has been established to the satisfaction of the Court, as has been done in this case, that such breaches have been waived. The waiver of the forfeiture recognises and affirms the tenancy, and, as a consequence, all the interests springing from it, one of which, in the present case, is a right to a grant of the fee. There can be no ground for holding that the contract is affirmed otherwise than in its entirety.

It is to be observed also, with regard to the forfeiture by non-payment of rent, that assuming it was not waived by the subsequent issuing of the lease, yet if, as their Lordships think, a Court of Equity would have relieved against it, the mere non-payment, the lessee continuing in possession, would not prevent a decree, upon proper terms, for specific performance.

An objection was taken to the petition on the ground that the claim was not within the *Crown Remedies and Liability Statute*, 1865 the 27th section of which enacts that nothing shall be deemed a claim within the meaning of the Act unless the same shall be founded on and arise out of some contract entered into on behalf of Her Majesty. It was said that the right to the grant of the fee was not given by contract but by statute. It is true that the right is created by the statute, but it is conferred upon the holder of a lease, and accrues to him by reason of such lease, and only upon payment of the full rent agreed to be paid under it. It is a statutory right annexed to the lease, and an implied term of the contract, and therefore may be properly said to be founded on and to arise out of it.

For the above reasons their Lordships think the appeal on the part of the Crown fails.

In the cross appeal the suppliant complains of that part of the decree which directs him to pay the penalty of 5*s.* per acre for non-improvement, and interest on the tendered rent.

The right of the Crown to insist on the penalty, and of the Court to impose payment of it as a condition of their decree, is not, in

consequence of the obscure language of the statutes, free from difficulty.

The contention on the part of the suppliant is that the persons entitled to exercise rights of selection under sect. 7 of the *Amending Act* of 1865 are not liable to the penalty imposed by sect. 126 of the Act of 1862. Their Lordships cannot accede to this view. The persons so empowered are those only who had already become entitled to select under the 23rd and 24th sections of the Act of 1862, but who had failed to exercise such rights within the time appointed by that Act; and the object of the 7th section was to give an extended time for making the selection. This indulgence, as might be expected, was given "subject to all the limitations, conditions, restrictions, and obligations attached by the Act of 1862 to such selection and purchase." It was not disputed that the words "conditions and obligations" applied to the obligation to improve contained in sect. 36; but it was said that they did not comprehend the payment of the penalty. It is plain, however, that the enactment imposing the penalty imports an obligation to pay it, which is as compulsory as that requiring the land to be improved, and both, in their Lordships' view, may properly be held to fall within the word "obligations." Besides, it is not probable that the Legislature, in granting an indulgence to dilatory selectors, intended to place them in a better position as regards these penalties than those who duly came in under the former Act. Strong reasons are required before an interpretation having this effect can be adopted.

What was most relied on by the suppliant was the proviso in the 7th section to the effect that the Board of Land and Works might make regulations for the purpose of enforcing the conditions and obligations, or preventing the violation or evasion of the provisions of the Act of 1862. It was suggested that the penalty, being a personal obligation only, had been found insufficient for these purposes, and that the new regulations were intended to be in lieu of it. But the answer to this suggestion is, that the power to make these regulations is in no way inconsistent with an intention to keep alive the enactment as to the penalty, and to provide, by means of regulations, cumulative remedies. Although numerous sections of the Act of 1862 are expressly repealed by the Act

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of 1865, the penalty clause is not. Sect. 36 (the improvement clause) is so repealed; but it is to be observed that this and other repealed clauses are, in a proviso to sect. 6 of the Act of 1865, expressly declared to remain in force as to lands to be selected under the 7th section, which indicates a clear intention on the part of the Legislature that selectors under that clause should be subject to the terms contained in the Act of 1862.

It appears that the Supreme Court had expressed an opinion in a former case, that the penalties did not attach upon persons becoming selectors under this sect. 7: *Kettle* v. *Reg.* (1). The Court is reported to have said that although not repealed "the penal clause was allowed to fall through." The opinion thus expressed was not necessary to the determination of the questions then before the Court; and whatever weight may be due to it is overbalanced by the decisions of the same Court in the suits now under appeal, in all of which the selectors under sect. 7 have been declared to be liable to the payment of the penalties.

The remaining complaint in the cross appeal was against the direction to pay interest on the overdue rent. The suppliant contended that having tendered the rent he was not liable to interest, This might be so in the case of ordinary rent; but the annual payments are in substance (as indeed was contended for the suppliant upon other parts of the case) instalments of the purchase-money for the fee; and inasmuch as the suppliant has had possession of the land, and has not paid the money into Court, their Lordships see no reason for disturbing the decree which directs interest to be paid.

For these reasons their Lordships think the suppliant's appeal also fails.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss both appeals, and to affirm the judgment appealed from.

There will be no order as to costs.

Solicitors for the Attorney-General of *Victoria*: Messrs. *Freshfields & Williams.*

Solicitor for *John Ettershank*: Mr. *Frederick Stanley.*

(1) 3 W. W. & A'B. 141.

THE ATTORNEY-GENERAL OF VICTORIA . APPELLANT; J. C.* 1875

AND

ROBERT JOHN GLASS . . . . . RESPONDENT.

AND THE CROSS APPEAL.

Sect. 101 *of Land Act of* 1869—*Effect of Notice of Forfeiture not under the Section.*

A notice in the *Gazette* of forfeiture of an allotment, a lease of which had been granted under the *Land Act*, 1862, to a selector under sect. 7 of the *Amending Land Act*, 1865, is insufficient in cases to which sect. 101 of the *Land Act* of 1869 does not apply, to determine the lease. Nor as regards a lessee in possession can it preclude a Court of Equity from relieving against the forfeiture, if the lessee is otherwise entitled to relief.

THE second of the five suits above mentioned also gave rise to two cross appeals. It will be seen from the judgment of their Lordships that the case differed from the previous one in that the lease, the subject of the alleged forfeiture, was actually issued, before the notice under sect. 101 of the *Land Act* of 1869 in the *Gazette* declared the same to be forfeited; while the notice itself was published after the Act was passed, but before the date fixed for its coming into operation, the section, however, in terms applying solely to "notices *heretofore* published."

Mr. *J. F. Stephen*, Q.C., Mr. *J. D. Wood*, and Mr. *Kekewich*, for the Appellant:—

The lease became void at law by non-payment of rent, the lessor having declared his intention to avoid it: *Thorburn* v. *Buchanan* (1); *McDowall* v. *Myles* (2); *Clough* v. *London and North Western Railway Company* (3); *Comyns'* Digest, vol. iii., Election, C. 1. They referred also to *Harvey* v. *Brydges* (4); *Kavanagh* v. *Gudge* (5); *Croft* v. *Lumley* (6); *Toleman* v. *Portbury* (7). [SIR MONTAGUE SMITH referred to *Arnsby* v. *Woodward* (8).]

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

(1) 2 Vict. Rep. 169.
(2) 6 W. W. & A'B. 16.
(3) Law Rep. 7 Ex. 34, 35.
(4) 14 M. & W. 437, 442.
(5) 7 Man. & G. 316, 320.
(6) 6 H. L. C. 672.
(7) Law Rep. 6 Q. B. 245; see also Law Rep. 7 Q. B. 344.
(8) 6 B. & C. 519.

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Mr. *Benjamin*, Q.C., and Mr. *Westlake*, Q.C., for the Respondent, referred to *Kettle* v. *Queen* (1); and upon the question of *Glass's* right to specific performance: *Bowser* v. *Colby* (2); *Gibson* v. *Goldsmid* (3); *Phipps* v. *Child* (4); *Green* v. *Low* (5); *Blackett* v. *Bates* (6).

Mr. *Stephen*, Q.C., in reply.

1875 *June* 22.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In this case, *Harpham*, the holder of a certificate under the *Land Act*, 1862, on the 20th of December, 1865, exercised the right of selection under sect. 7 of the Act of 1865. He paid the rent of 2*s.* 6*d.* per acre for the first year in advance, and also the second and third year's rent; but did not improve the allotment within a year as required by the 36th section of the Act of 1862.

A lease was granted to *Harpham*, dated the 20th December, 1865, containing terms and conditions similar to those in the lease to *Ettershank;* but it was not issued until the 20th of August, 1869. On the 30th of that month the suppliant, *Glass*, obtained a transfer from *Harpham*, and on the same day registered it, and obtained a certificate of title. Previously, viz., on the 26th of the same month, the sum of £1 5*s.* had been paid to, and accepted by, the proper officer on account of rent then due.

On the 28th of January, 1870, a notice was published in the *Gazette*, notifying that the leases of several allotments, including *Harpham's*, had been declared forfeited by the Governor in Council for non-payment of rent and non-performance of covenants.

This case differs from *Ettershank's* only in these respects:— 1. That the lease to *Harpham* was issued before the notice of forfeiture was published in the *Gazette;* and, 2, that if sect. 101 of the Act of 1869 applies, the notice, being published on the 28th of January, 1870, which was after the date of the passing of the Act (29th of December, 1869), but before the time appointed for its coming into operation (1st of February, 1870), a question would

(1) 3 W. W. & A'B. 50, 341.
(2) 1 Hare, 138.
(3) 5 D. M. & G. 757.
(4) 3 Drew. 709.
(5) 22 Beav. 625.
(6) Law Rep. 1 Ch. 117.

arise whether it was within that section as a notice "*heretofore* published."

These differences, however, and the determination of this last question, have become immaterial in consequence of their Lordships' decision in the former case that sect. 101 is not applicable to leases like the present.

It was, indeed, suggested for the Crown in this case that the notice in the *Gazette*, if not conclusive under the statute, was at least evidence that the governor had declared his election to avoid the lease, and that it thereby became determined. But the condition in this case gave a right of re-entry only, and it is by no means to be assumed that a mere notice of this kind, without some further act, would be sufficient, independently of the statute, to put an end to the interest. The necessity for resorting, for this purpose, to the old procedure by inquisition taken and office found, or for actual re-entry, was abolished in *England* in the case of the Crown by the *Queen's Remembrancer Act* (22 & 23 Vict. c. 21, s. 25); but it does not appear that a similar statute has been passed in the colony. It is unnecessary, however, to determine whether the above procedure, or a re-entry, would be required in this case, or what would amount to a re-entry; because, as to the forfeiture accruing from non-improvement, their Lordships must hold, in accordance with their former decision, that it was waived by receipt of rent before the notice was published; and as to the non-payment of subsequent rent, the mere publication of such a notice, whilst the lessee was allowed to remain in possession, would not, in their opinion, preclude a Court of Equity from giving him relief, if he was otherwise entitled to it.

These being the only causes of forfeiture relied on by the Crown, and both being governed by the opinion of their Lordships expressed in the former case, they must hold that the appeal on the part of the Crown in this case has not been supported.

In the cross appeal the points raised with respect to the liability of the suppliant to penalties and to interest on the tendered rent are the same as in *Ettershank's* case, and must be decided in the same way.

Both appeals in this suit, therefore, fail; and their Lordships will humbly advise Her Majesty that they be dismissed, and the

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judgment of the Supreme Court affirmed. There will be no order as to costs.

Solicitors for the Attorney-General of *Victoria*: Messrs. *Freshfields & Williams.*

Solicitors for *Robert John Glass*: Messrs. *Stoneham & Legge.*

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JAMES WINTER . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL OF VICTORIA . RESPONDENT.

WILLIAM IRVING WINTER . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL OF VICTORIA . RESPONDENT.

KATE McMILLAN . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL OF VICTORIA . RESPONDENT.

Construction of Sect. 98 of Land Act, 1869—*Certificate from Board of Land and Works.*

A lessee under the *Land Act*, 1862, and the 7th section of the *Amending Land Act* of 1865, who has obtained a certificate under the *Transfer of Land Act*, 1866, and has performed all the obligations under his lease, including the obligation to improve, imposed by sect. 36 of the *Land Act*, 1862, and has incurred no penalty, is entitled to a grant of his allotment in fee without obtaining a certificate under sect. 98 of the *Land Act*, 1869, from the Board of Land and Works that such last-mentioned obligation has been fulfilled.

Sect. 98 applies solely to cases where a penalty has been incurred. According to the true construction thereof, whenever a penalty has been incurred the governor may demand it before issuing a grant, but it is not made obligatory on him to do so; provided that no grant shall be issued when a penalty has been once incurred, unless the applicant shall have obtained a certificate of the board that the provisions referred to in the section have been at some previous time complied with, or, failing that, has paid the penalty.

THESE three appeals were heard together, and the question in each case turned upon the construction of the 98th section of the *Land Act* of 1869.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

Mr. *Benjamin*, Q.C., Mr. *Westlake*, Q.C., and Mr. *Hemming*, for the Appellants.

Mr. *Stephens*, Q.C., Mr. *J. D. Wood*, and Mr. *Kekewich*, for the Respondent.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

In these three suits the Supreme Court, reversing the judgment of Mr. Justice *Molesworth*, dismissed the petitions with costs.

The question in each appeal turns upon the construction of the 98th section of the *Land Act*, 1869.

The Appellants established, to the satisfaction of the Courts below, and their finding on the facts is not now disputed by the Crown, that the obligations under their leases, including the obligation to improve imposed by sect. 36 of the *Land Act*, 1862, had been in all respects performed. But the Supreme Court has held, that by the operation of the 98th section of the Act of 1869, the Appellants are not entitled to grants in fee of their allotments until they shall have obtained a certificate from the Board of Land and Works that the provisions of sect. 36 had been complied with, or in default of such certificate shall have paid the penalty of 5*s*. per acre.

This 98th clause is not merely ambiguous, but, according to the literal meaning of its language, insensible. There is no doubt, however, to what the first and substantive part of the clause applies. It clearly applies only to cases where a penalty has been incurred. So far the clause is intelligible; it enacts that the payment of the penalty, which was a personal obligation only under the former Act, might be insisted on from the selector or his assignee as a condition of obtaining the grant. The difficulty arises in the proviso. The Supreme Court, in construing this proviso, has severed it from the previous part of the section, and regarded it as an independent enactment, rejecting the words of reference. So treating the proviso, the Court held that it applies to all allotments the selectors of which might become liable to penalties for the breach of the 36th section, whether such penalties

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have been incurred or not. If the Judges are right in thus holding, the view they take of the scope of the Act so construed would be correct, viz., that the Legislature has conferred on the Board of Land and Works the power of deciding whether the obligation to improve has been fulfilled; and that the applicant must either obtain the certificate of the board to that effect or pay the penalties before he is entitled to a grant.

The conclusion that this was the purpose of the Act ought not, however, to be come to, unless the language of the section clearly expresses it, for the enactment so construed would materially affect existing contracts, by transferring the determination of the liability of the lessees to the payment of heavy penalties from the Courts of law to a board of executive officers.

The opposite interpretation is, that the clause applies, wholly and solely, to cases where a penalty has been incurred, and that the matter introduced in the form of a proviso should be regarded as a proviso, and not as an independent clause.

It is not disputed that, whatever construction may be given to this obscure clause, some violence must be done to its language. Their Lordships are disposed to accept the interpretation put on it by the Appellants as being more consistent with the frame of the clause, and, on the whole, with its language, than the other view. Reading the clause as a whole, its meaning would appear to be, that whenever a penalty has been incurred, the governor may demand it before issuing a grant, but it is not made obligatory on him to do so; then the proviso, which is imperative, may be taken to mean that no grant shall be issued in a case where a penalty has been incurred, unless the applicant has obtained the certificate of the board that the provisions referred to have been, at some previous time, complied with, or, failing that, has paid the penalty. No doubt this interpretation does not give to the words "fully complied with" their entire and natural meaning, as it assumes that the improvement had not been made within the prescribed time, and that the provisions in that respect had not been complied with; but this modification does less violence to the clause and its language than would be done by wholly changing its framework and striking out the words of reference in the proviso.

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On the whole, therefore, having regard to the structure of the clause, and to the plain words of relation to the substantive part which are found in the proviso, their Lordships agree with Mr. Justice *Molesworth's* construction, and consequently with his opinion, that no penalties having been incurred in the case of either of these Appellants, their respective claims to receive grants are unaffected by the clause in question.

Their Lordships will, therefore, humbly advise Her Majesty that the judgments of the Supreme Court in these three suits should be reversed, and the decrees of Mr. Justice *Molesworth* affirmed, and that the several suppliants should have their costs of their respective appeals to the Supreme Court, and to Her Majesty.

Solicitors for the Attorney-General of *Victoria:* Messrs. *Freshfields & Williams.*

Solicitors for *James* and *W. I. Winter* and *Kate McMillan:* Messrs. *Stoneham & Legge.*

YEAP CHEAH NEO AND OTHERS . . . . APPELLANTS;

AND

ONG CHENG NEO . . . . . RESPONDENTS.

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July 6, 7, 8, 28.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENT, IN ITS DIVISION OF PENANG.

English Law in Penang—Will—Construction—Gift of Residue to Executors, whether absolute or in trust—Gifts void for uncertainty—Perpetuity—Power of Appeal from the Supreme Court of Penang.

A testatrix, after appointing four executors, made over to them by her will "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned;" and after directing them to preserve certain houses as a family house, and giving certain specific bequests, disposed of the residue of her estate as follows:—

"As regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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3 Ch D. 349.
3 Ch D 533.

may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just":—

Held, that, according to the true construction of the above clause, there was no absolute gift to the executors as individuals. The residue was not severed from the trust with which the testatrix had clothed all her property in the hands of her executors, but although a trust was intended to be created, it failed for want of adequate expression of it.

A gift "of the upper storey of four specific houses or shops, to be occupied by the several members and descendants of *K. S. C.* and *L. K. W.* as already proposed;" *i.e.*, as the context shewed, as a family house for the use of two separate families, *held* to be void for uncertainty, and as denoting an intention to create a perpetuity.

A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold," is void as a devise in perpetuity.

A direction "that a house for performing religious ceremonies to my late husband and myself be erected" is void; such a devise being in perpetuity, and not for a charitable use.

The law of *England* must, having regard to the Royal Charters of 1807, 1826, and 1855, be taken to be the law of *Penang* so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. English statutes, therefore, in their nature inapplicable to *Penang* are not introduced along with the general law of *England*.

Mayor of Lyons v. *East India Company* (1) approved.

The rule however which prevails in *England* against perpetuities, which exists independently of statutes, and is founded upon public policy, is part of the law of the colony; so, also, the exception to that rule which exists in favour of charitable uses, passes with the rule into the said law.

Choah Choon Nioh v. *Spottiswoode* (2) approved.

The power of appeal to Her Majesty, and the authority of the Supreme Court of the *Straits Settlement* to grant leave to do so, contained in the letters patent of the Queen of the 10th of August, 1855, were not abrogated by Ordinance No. 5 of 1868, establishing the present Supreme Court. All the provisions of the repealed letters patent applicable to the old Court were virtually re-enacted by the Ordinance, and made applicable to the new Court which was put in its place.

APPEAL from a decree of the Supreme Court of the colony of the *Straits Settlement* in its division of *Penang*, dated the 24th of July, 1872, and also from a subsequent order of that Court (July 4, 1873) refusing leave to appeal against such decree. Special leave to appeal was granted by Her Majesty in Council on the 2nd of February, 1874.

The nature of the questions decided, and the manner in which

(1) 1 Moore, P. C. 175. (2) Wood's Oriental Cases.

they arose, appear on the face of the judgment of their Lordships. It may be convenient to the reader to add to the clauses of the will therein set out the 11th and 14th, which are as follows:—

"Eleventh: My two plantations at *Batu Sanchang* comprised in bill of sale, registered No. 100 and 131 respectively, in which the graves of the family are placed, I direct to be reserved as the family burying place, and not to be mortgaged or sold."

"Fourteenth: I direct that my funeral expenses shall be such as my executors and other friends may think proper, and I further direct that a house termed ("*Sow Chong*") for performing religious ceremonies to my late husband and myself be erected on some part of the ground of the four shops or houses, already so often referred to, and of such size and description as to my executors may seem fit and proper."

Mr. *Hemming*, Q.C., and Mr. *Ford North*, for the Appellants, contended, amongst other things, that by the residuary clause of the will there was a good gift of the residue, and an absolute disposing power and ownership over it given, to the Appellants and *Lim Cheng Keat* beneficially. The trust with regard to the upper storey of four shops contained in clause 2, and the trusts respectively declared in clauses 11 and 14, were valid, free from uncertainty, and constituted no infringement of the rule against perpetuities. There was a beneficial gift of the residue to the executors: see *Williams* v. *Arkle* (1); *Morice* v. *Bishop of Durham* (2); *Gibbs* v. *Rumsey* (3).

Mr. *F. J. Stephens*, Q.C., and Mr. *C. Russell*, for the Respondent *Ong Cheng Neo*, contended that the trusts declared in clauses 2, 11, and 14 were void for uncertainty, and as creating perpetuities; that where the trusts were inadequately expressed, the subjects thereof fell into the general residue of the testatrix's estate; and that by the 15th, *i.e.*, the residuary clause of the will, the residue was vested in the executors as trustees, and not as beneficiaries, with a resulting trust in favour of the testatrix's next of kin. Upon this last clause the question was, whether any trust was declared, it being immaterial whether it was a good trust or not.

(1) Unreported, H. of L., June 7, 1875.

(2) 10 Ves. 535.

(3) 2 V. & B. 294.

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The executors were described as trustees with the necessary powers, and the case came within *Morice* v. *Bishop of Durham* (1), and not within *Gibbs* v. *Rumsey* (2).

Mr. *Hemming*, Q.C., replied.

[The cases cited and commented upon on both sides were:— *Fowler* v. *Garlike* (3); *Vezey* v. *Jamson* (4); *Stubbs* v. *Sargon* (5); *Corporation of Gloucester* v. *Wood* (6); *Briggs* v. *Penny* (7); *Saltmarsh* v. *Barrett* (8); *Barrs* v. *Fewkes* (9); *Meredith* v. *Heneage* (10); *Read* v. *Steadman* (11); *Knight* v. *Boughton* (12); *Reeves* v. *Baker* (13); *Re Macleay* (14); *Rogers* v. *Rogers* (15): *Dawson* v. *Clarke* (16); *Hughes* v. *Evans* (17); *Williams* v. *Roberts* (18); *Clarke* v. *Hilton* (19); *Lambe* v. *Eames* (20); *Pratt* v. *Sladden* (21); *Rickard* v. *Robson* (22); *Lloyd* v. *Lloyd* (23); *Thomson* v. *Shakespear* (24); *Ellcock* v. *Mapp* (25); *Buckle* v. *Bristow* (26); *Ellis* v. *Selby* (27); *Heath* v. *Chapman* (28); *West* v. *Shuttleworth* (29); *Alexander* v. *Alexander* (30); *Knight* v. *Knight* (31); *Williams* v. *Williams* (32); *Webb* v. *Wools* (33).]

1875 July 28.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a decree of the Supreme Court of the *Straits Settlements* (Division of *Penang*), in a suit in equity,

(1) 10 Ves. 535.
(2) 2 V. & B. 294.
(3) 1 Russ. & My. 232.
(4) 1 S. & S. 69.
(5) 2 Keen, 260.
(6) 3 Hare, 148.
(7) 3 Mac. & G. 546.
(8) 29 Beav. 474.
(9) 2 H. & M. 60; S. C. 33 L. J. (Ch.) 484.
(10) 1 Sim. 542.
(11) 26 Beav. 495.
(12) 11 Cl. & F. 550.
(13) 18 Beav. 372.
(14) 23 W. R. 718.
(15) 3 P. Wms. 193.
(16) 15 Ves. 409; 18 Ves. 247.
(17) 13 Sim. 496.
(18) 27 L. J. (Ch.) 177.
(19) Law Rep. 2 Eq. 810.
(20) Law Rep. 6 Ch. 597.
(21) 14 Ves. 193.
(22) 31 Beav. 244; S. C. 31 L. J. (Ch.) 896.
(23) 2 Sim. (N.S.) 255.
(24) 1 D. F. & J. 399.
(25) 3 H. L. C. 492; S. C. 2 Ph. 793.
(26) 10 Jur. (N.S.) 1095.
(27) 1 My. & Cr. 286.
(28) 2 Drew. 417.
(29) 2 M. & K. 684.
(30) 6 D. M. & G. 593.
(31) 3 Beav. 148; S. C. 11 Cl. & F. 513.
(32) 1 Sim. (N.S.) 358.
(33) 2 Sim. (N.S.) 267.

brought by the first Respondent, *Ong Cheng Neo*, against the Appellants, the executors of the will of *Oh Yeo Neo*. Some of the legatees under the will were also made Defendants in the suit. The first Respondent claimed to be entitled as the half-sister and one of the next of kin of the testatrix. She did not dispute the validity of the will, but contended that the bequest of the residue and some of the specific bequests were void.

The testatrix and the parties to the suit were Chinese, dwelling in *Penang*, and the real property devised by the will is situated in that island.

The first question raised in the appeal related to the right of *Ong Cheng Neo* to maintain the suit. It was not disputed that she and the testatrix were daughters of the same mother, *Cheah Tuan Neo;* but it was contended that *Ong Cheng Neo* was not legitimate. It appears that the testatrix was the only child of *Cheah Tuan Neo,* by her husband *Oh Wee Kee,* who died in 1806. It is said that in 1809 the widow, *Cheah Tuan Neo,* married *Ong Sai,* and that the Respondent, *Ong Cheng Neo,* and a deceased sister, were the offspring of that marriage. The Appellants do not deny that the widow and *Ong Sai* cohabited from 1809 until *Ong Sai's* death in 1811 or 1812, but they dispute the alleged marriage. A great deal of evidence was gone into upon the question, to which their Lordships do not think it necessary to advert in detail, since they are perfectly satisfied with the conclusion at which the learned Judge below has arrived, viz., that the marriage was established.

It was not disputed that *Ong Sai* and *Cheah Tuan Neo* lived together as man and wife, and were so treated by their family and friends, nor that the Plaintiff and her deceased sister were regarded and treated as legitimate children. So much was this the case that the testatrix herself had allowed her sister, *Ong Cheng Neo,* to take out administration to the mother's effects. In addition to strong and consistent evidence of reputation, witnesses were called who were present at the marriage festivities; and although some of the usual ceremonies, such as the giving away of the woman, were not distinctly proved to have taken place, there is ample evidence from which, at this distance of time, the performance of them may be presumed.

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The principal opposing evidence came from some members of the family, who say they were not present at any marriage ceremony, and did not know that any had occurred, and of a witness who deposed that the testatrix had spoken of the connection of her mother with *Ong Sai* as a shameful one. But the Judge below has expressly found that this last witness was not worthy of credit, and the evidence of the other witnesses relates to facts of a negative or inconclusive character, which the Judge rightly thought was insufficient to countervail the positive evidence of the witnesses who were present at the marriage festivities, and the presumption arising from reputation.

It is said that, with the Chinese, the difference between the social status of a wife and that of a concubine, and in the position and treatment of legitimate and illegitimate children is so slight, that what is termed reputation affords no satisfactory ground for presuming a marriage. But if this be so, which, however, is not very clearly established, their Lordships see no reason, in the absence of satisfactory evidence to the contrary, why the ostensible relations of the parties should not be referred to a legitimate and correct connection, rather than to an illegitimate, and, to say the least, a less correct one.

The will in question is drawn in the style of an English will, and attested according to English law; and the main question in the suit, viz., the effect of the bequest of the residuary estate to the executors, was discussed and argued at the bar upon the principles which govern such a bequest in an English will.

The will commences as follows:—

"Know all men by these presents that I, *Oh Yeo Neo*, Chinese single woman, being of sound mind, do hereby make and publish this my last will and testament.

"I am now possessed of considerable property in money, houses, lands, and so forth, and of four shops or houses in *Beach Street*, numbered respectively 40, 41, 42, and 43, comprised in two bills of sale, registered respectively No. 313 and 1930, and of two Government grants for land reclaimed from the sea, and forming part and parcel of the four shops or houses just mentioned, these four shops or houses having been left by my late husband, *Lim Kong Wah*, who died about twenty-six years ago.

"Having no children of my own, and having every confidence in *Yeap Cheah Neo*, the wife of one of the partners of my late husband, named *Khoo Seck Chuan*, with whom I have long lived, in *Koo Kay Chan*, her son, in *Khoo Siew Jeong Neo*, her daughter, and in *Lim Cheng Keat*, a nephew of *Lim Kong Wah*, her son-in-law, I do hereby appoint them the executors of this my last will and testament, and I do hereby make over to them as such all property and effects whatsoever that may belong to me at the time of my death, but in trust always for the purposes hereinafter to be mentioned.

"1st. As my long experience tells me that nothing tends so much to the prosperity, happiness, and respectability of a family as keeping its members as much as possible together, it is my wish that the four shops or houses left by my late husband should continue to be the family house and residence of the family of *Khoo Seck Chuan* referred to above, and also of any part of the family of *Lim Kong Wah*, my late husband, now residing in *China*, who may visit this island, and that they shall neither be mortgaged nor sold.

"2nd. With this object in view I direct my executors, as soon after my death as possible, to lease to two of their number, named *Koo Kay Chan* and *Lim Cheng Keat*, their heirs and assigns, the lower storey of the said four houses or shops, that is to say, the whole of the shops, warehouses, and all other places in the premises now used for such purposes, or that may be added thereto, for a period of forty years from the day of my death, at the rent of 100 dollars per month for each and every month during the said period of forty years. The upper storey of these same four houses or shops to be occupied by the several members and descendants of *Khoo Seck Chuan* and *Lim Kong Wah*, as already proposed."

The testatrix then in other clauses (numbered 3 to 14), by way of directions to her executors, makes specific dispositions of portions of her property, principally for the benefit of members of the families of *Khoo Seck Chuan* and of *Lim Kong Wah*, her late husband.

Some of these clauses raise questions apart from the gift of the residue, which have to be decided in this appeal.

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The concluding clauses of the will are as follows:—

"15th. As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just.

"16th. It is my wish that my executors may not be interfered with in the management of my affairs, and that any one of them accepting this trust shall be competent to manage it, and that in the management thereof the wish of the majority shall prevail. I direct that if any of my executors from absence, death, or any other cause, become incompetent to act, that the continuing executors appoint other executors or trustees in his or their place and stead. It is my wish also that each of my executors shall only be liable for his own acts and intromissions, and not for those of the others of them."

It will be seen from the will that the testatrix wished to benefit the relatives of her late husband, some of whom lived in *China*, and also the family of her husband's partner, *Khoo Seck Chuan*, some of the latter being her executors and trustees.

It was contended on the part of the Appellants that the residuary clause contained an express bequest to the executors in terms which imported an absolute gift to them; and a recent decision of the House of Lords (*Williams* v. *Arkle* (1)) was cited to establish that in the case of such a devise the Statute of the 11 Geo. 4 & 1 Wm. 4, c. 40, had no application. Their Lordships entirely concur in that view of the statute; but the question of the nature and character of the bequest remains, and it has to be decided whether, according to the proper and natural construction of the language and provisions of the will in question, regarded as a whole, the intention was to create a trust in the residue, or to make a beneficial gift of it to the executors. This question, in all cases of the kind, must be determined, as Lord *Cottenham* said in

(1) Unreported, H. of L., June 7, 1875.

Ellis v. *Selby* (1), upon the construction of the language of the instrument in each particular case.

In entire accordance with Lord *Cottenham's* view the present Lord Chancellor, in delivering his opinion to the House of Lords in *Williams* v. *Arkle*, said:—"Where an express devise of the residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction."

In the numerous decisions which are found in the books on this subject, various matters have been relied on as *indicia* of intention on the one side or the other, such as the use of the words "upon trust;" the gift of specific legacies to the executors or trustees; and the mention of the executors by their proper names. *Indicia* of this kind, on which eminent Judges have relied, may no doubt afford in some cases useful aids to construction, but after all they may, and often must, be modified by the provisions and language of the particular instrument to be construed.

Mr. *Hemming*, for the Appellants, cited what he described to be two representative cases on the subject: *Morice* v. *Bishop of Durham* (2), and *Gibbs* v. *Rumsey* (3).

He did not deny the principle laid down by Lord *Eldon* in *Morice* v. *Bishop of Durham*, that "If the testator meant to create a trust, and not to make an absolute gift; but the trust is ineffectually created, or is not expressed at all, or fails, the next of kin take." Indeed, he cited that case as a leading authority, but he contended that the present one fell within the decision of Sir *W. Grant* in *Gibbs* v. *Rumsey*, who there held that the words of a residuary clause giving the residue to the trustees and executors "to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think proper and expedient" did not in the particular will before him import a trust, but an absolute gift to the trustees.

This case of *Gibbs* v. *Rumsey* (3) is the authority on which the Appellant's counsel most strongly relied, but it is to be observed with regard to it that even if the present will were not distinguishable (a question to be presently considered), Lord *Cottenham* certainly

(1) 1 My. & Cr. 298. (2) 10 Ves. 535.
(3) 2 V. & B. 294.

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expressed no approval of the case in *Ellis* v. *Selby* (1), and *Wood*, V.C., in *Buckle* v. *Bristow* (2), spoke of it as going to the verge of the law.

Coming to the will in question, it will be seen that, in the commencement, the testatrix, after appointing four executors, makes over to them "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned," words which, taken alone, indisputably impress a trust upon the whole property.

The 1st and 2nd clauses shew the desire of the testatrix to keep the family together, and for this purpose she directs the executors to preserve certain houses as a family house, for the residence of the family of *Khoo Seck Chuan*, and of any members of her late husband's family living in *China* who might visit *Penang;* and she directs what appears to be a beneficial lease of some shops in the lower part of the houses to be granted to two of the executors for forty years.

By a further clause the testatrix directs $50,000 to be given on loan to the same two executors for forty years, at 5 per cent. interest, but directs that the rents of the shops and their interest shall become part of her trust estate.

There are numerous other specific bequests, but it appears that they are far from exhausting the estate, and that a large residue will be left.

The clause disposing of this residue has been before set out at length. In trying to reach its meaning, it is to be observed that it contains no words of gift, but directions to the executors, and that they are mentioned by that title, and not by name. The first direction is to collect and receive the residue; the next, "that they, their heirs, successors, representatives, or descendants, may apply and distribute the same (all circumstances duly considered) in such manner and to such parties as to them may appear just." These are neither usual nor apt words of absolute gift; on the contrary, they indicate an intention to impose a trust to distribute the fund among persons other than, or at all events, in addition to, themselves.

It may be inferred from the rest of the will that the persons intended to be benefited were the members of the families she

(1) 1 My. & Cr. 286. (2) 10 Jur. (N.S.) 1095.

desired to keep together. It was said that the words give an indefinite and unlimited power of disposition, and, therefore, amount to an absolute gift. But it is evident from the whole will that this was not the intention of the testatrix, and that, on the contrary, she had in her mind throughout the desire to benefit two families, although she has failed to define her object with the requisite certainty.

That this was her real purpose, and that it was her intention to create a trust to carry it into effect, seems to be apparent both from the general frame of the will, and its particular provisions.

Looking only to the bequests to the executors, what appears? The first bequest vests all the property in the executors "as such" and "in trust always" for the purposes thereafter mentioned. Then turning to the residuary clause, the use of words of injunction instead of those of gift or bequest, the directions given to the executors, not by name, but by the description of "my executors," the nature of these injunctions, viz., to collect the residue and distribute it, after duly considering all circumstances, to such parties as to them, their heirs, successors, &c. may seem just, and the mention of successors in relation to this duty, all negative the supposition that the testatrix intended to sever the residue from the trust with which she had clothed all her property in the hands of her executors, and to make an absolute gift of it to them as individuals.

It was said that the learned Judge of the Supreme Court laid too great stress on the inference arising from the clause relating to the management of the estate, and the appointment of new executors and trustees. Undoubtedly, in any view of this case, there were trusts to be performed, which would make such a clause pertinent; and if there had been plain words of gift to the executors, as in *Williams* v. *Arkle* (1), little weight could be attached to this clause. It is enough for their Lordships to say of it, agreeing so far with the learned Judge below, that, in their opinion, its provisions and language are more consistent with the construction they have put on this will, than with the opposite view of it.

It will be seen from the above analysis of the will in question, that it differs in material respects from that in *Gibbs* v. *Rumsey* (2).

(1) Unreported, H. of L., June 7, 1875. (2) 2 V. & B. 294.

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There property was devised to the executors upon trust to sell and to pay certain legacies, and this was followed by a clear gift of the residue, introduced by the apt words, "I give and bequeath," to the trustees and executors, whose names were given in a parenthesis, with absolute power of disposition, and without any indication of the families or persons whom the testatrix desired to benefit. This will, both in its frame and provisions, materially differs from that now in question.

Several cases were cited in the argument, in which various forms of expression, conferring unlimited and unconditional powers of disposition, were held to amount to absolute gifts. It is unnecessary, however, to discuss these decisions, or to consider what would be the proper construction of the discretionary power in this will if it had been coupled with plain words of gift, uncontrolled by other parts of the will. Their Lordships' decision, founded on the whole will, is, that a trust was intended to be created, which has failed for want of adequate expression of it.

The decree below has declared several of the specific bequests to be void; and as regards three of them, the decree is complained of in this appeal.

These are, first, the devise of the upper storey of the four shops in trust for a family residence of the families of *Lim Kong Wah* and *Khoo Seck Chuan*, which is declared to be void "for uncertainty and as infringing the rules against perpetuities;" secondly, the devise in the 11th clause of two plantations, in trust to be reserved as a family burying-place, with a prohibition against mortgaging or selling the same, which is declared void, "as infringing the rule against perpetuities;" and, thirdly, the devise in the 14th clause, directing that a house, termed *Sow Chong*, for performing religious ceremonies to the testatrix's deceased husband and herself, should be erected, as to which the decree declares, "that the said trust not referring to a charitable object, is void, as infringing the rule against perpetuities."

In considering what is the law applicable to bequests of the above nature in the *Straits Settlements*, it is necessary to refer shortly to their history.

The first charter relating to *Penang* was granted by *George* III., in 1807, to the *East India Company*. It recited that the com-

pany had "obtained by cession from a native prince," *Prince of Wales' Island*, and a tract of country in the peninsula of *Malacca*, opposite to that island, that when such cession was made, the island was wholly uninhabited, but that the company had since built a fort and a town, and that "many of our subjects and many Chinese, Malays, Indians, and other persons professing different religions, and using and having different manners, habits, customs, and persuasions, had settled there." The charter made provision for the government of the island, and the administration of justice there. It established a Court of Judicature, which was to exercise all the jurisdiction of the English Courts of Law and Chancery, "as far as circumstances will admit." The Court was also to exercise jurisdiction as an Ecclesiastical Court, "so far as the several religions, manners, and customs of the inhabitants will admit."

A new charter was granted by *George* IV. in 1826, when the island of *Singapore* and the town and fort of *Malacca* were annexed to *Prince of Wales' Island*, which conferred in substance the same jurisdiction on the Court of Judicature as the former charter had done.

The last charter granted to the *East India Company*, in the year 1855, again conferred the like powers on the Court; and this jurisdiction was not altered in its fundamental conditions by the Act of 29 & 30 Vict. c. 95, and the Order of the Queen in Council made in pursuance of it, by which the *Straits Settlements* were placed under the government of Her Majesty as part of the colonial possessions of the Crown, nor by Ordinance No. 5 of 1868, constituting the present Supreme Court.

With reference to this history, it is really immaterial to consider whether *Prince of Wales' Island*, or, as it is now called, *Penang*, should be regarded as ceded or newly-settled territory, for there is no trace of any laws having been established there before it was acquired by the *East India Company*. In either view the law of *England* must be taken to be the governing law, so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. This would be the case in a country newly settled by subjects of the British Crown; and, in their Lordships' view, the charters referred to, if they are to be regarded as having introduced the law of *England* into the colony,

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contain in the words "as far as circumstances will admit," the same qualification. In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of *England*, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of *England* may be introduced into it. Thus it was held by Sir *W. Grant* that the Statute of Mortmain was not of force in the island of *Grenada* (*Attorney-General* v *Stewart* (1)). The subject is discussed at large in *Mayor of Lyons* v. *East India Company* (2).

The learned Judge below has not, however, held the gifts in question to be void on the ground that they infringed any statute, but because they were opposed to the rule of the English law against creating perpetuities.

Their Lordships think it was rightly held by Sir *P. Benson Maxwell*, Chief Justice, in the case of *Choah Choon Nioh* v. *Spottiswoode* (3), that whilst the English statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the colony, the rule against perpetuities was to be considered a part of it. This rule, which certainly has been recognised as existing in the law of *England* independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as *Penang* as to *England;* viz., to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if land convenient for the purposes of trade or for the enlargement of a town or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of *England* has, however, made an exception, also on grounds of public policy, in favour of gifts for purposes useful and beneficial to the public, and which, in a wide sense of the term, are called charitable uses; and this exception may properly be assumed to have passed with the rule into the law of the colony. (See *Thompson* v. *Shakspear* (4); *Carne* v. *Long* (5).)

(1) 2 Mer. 143.
(2) 1 Moore, P. C. 175.
(3) Wood's Oriental Cases.
(4) 1 D. F. & J. 399.
(5) 2 D. F. & J. 75.

The question then is, whether the Judge below is right in holding that the bequests in question infringed the rule, and did not fall within the exception.

The first of them, which relates to the upper storey of the houses the testatrix desired to make a family house, appears to their Lordships to be void on both the grounds mentioned in the decree. The context shews that, in using the word "family," the testatrix meant at least two families, and that she intended to include not only descendants, but other members. From other parts of the will, and from the evidence, it would seem that children had been adopted by members of the family, and, having regard to Chinese family usages, which may be properly taken into consideration in construing the will, it is probable the testatrix meant to include some, at least, of these adopted children, but what natural and adopted members of the family she really intended to benefit is left wholly obscure and uncertain. The devise is, therefore, for that reason void. Then the expression of her desire to perpetuate the family and to keep the house for their residence, and the direction that the houses should neither be mortgaged nor sold, clearly denote an intention to create a perpetuity. Their Lordships, therefore, see no ground to disturb the decree with regard to this devise.

The devise of the two plantations in which the graves of the family are placed, to be reserved as the family burying-place, and not to be mortgaged or sold, is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a charitable use. The weight of authority is against a devise of this nature being so held in the case of an English will; and the only point therefore requiring consideration can be, whether there is anything in Chinese usages with regard to the burial of their dead, and in the arrangements for that purpose in *Penang*, which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the kind adverted to, and of the extent of these plantations, their Lordships feel unable to say that the decree on this point is wrong.

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The remaining devise to be considered is the dedication by the testatrix of the *Sow Chong House* for the performance of religious ceremonies to her late husband and to herself. It appears to be the usage in *China* to erect a monumental tablet to the dead in a house of this kind, and for the family at certain periods to place, with certain ceremonies, food before the tablet, the savour of which is supposed to gratify the spirits of their deceased relatives. This usage, with the accompanying ceremonies, is minutely described by Sir *P. Benson Maxwell*, in his judgment in the case of *Choah Choon Nioh* v. *Spottiswoode* (1).

Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself. The dedication of this *Sow Chong House* bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held, in *West* v. *Shuttleworth* (2), not to be a charitable use, and, although not coming within the statute relating to superstitious uses, to be void. The learned Judge was therefore right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any church who may have devised property to maintain the tombs of deceased relatives. (See *Rickard* v. *Robson* (3), and *Hoare* v. *Osborne* (4).) All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.

Their Lordships' decision on the bequest they have last considered accords with the judgment of Sir *P. Benson Maxwell* in the case already referred to. It appears to them that in that judgment the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and

(1) Wood's Oriental Cases.
(2) 2 M. & K. 684.
(3) 31 L. J. (Ch.) 896; S. C. 31 Beav. 244.
(4) Law Rep. 1 Eq. 585.

usages of the various people residing in the colony are correctly stated.

It remains to be observed that this appeal has been heard upon special leave granted by their Lordships after leave to appeal had been refused by the Supreme Court of the colony. This refusal proceeded upon the opinion of the Court that the power of appeal to Her Majesty and the authority of the Court to grant leave to do so contained in the letters patent of the Queen of the 10th of August, 1855, were abrogated by Ordinance No. 5 of 1868 establishing the present Supreme Court.

It was admitted by the learned counsel for the Respondents that they could not uphold this decision; and upon referring to the Ordinance, their Lordships think the Supreme Court misconceived its effect. It is true that the Ordinance enacts, in the 1st section, that the Court of Judicature established under the letters patent above referred to, is thereby abolished; and that the letters patent shall cease to have any operation in the colony. But the 4th section enacts, that all provisions of Acts of the Imperial Parliament, Orders of Her Majesty in Council, letters patents, &c., in force in the colony when the Ordinance came into operation, and which are applicable to the Court of Judicature (*i.e.*, the Court abolished by the Ordinance), or to the Judges thereof, shall be taken to be applicable to the Supreme Court (*i.e.*, the Court established by the Ordinance) and to the Judges thereof. The effect of these enactments, taken together, is that whilst the repealed letters patent ceased to have any operation of their own, all the provisions contained in them applicable to the old Court were virtually re-enacted and made applicable to the new Court which was put in its place, as effectually as if they had been repeated at length in the Ordinance.

The other parts of sects. 4 and 30 are entirely consistent with this interpretation.

In the result, their Lordships will humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the Supreme Court. But, considering that the questions involved in the suit are novel, and in some respects of the first impression, that the litigation has arisen mainly in consequence of the obscure and uncertain manner in which the testatrix has expressed her wishes, and that the

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executors were thereby placed in difficulty with respect to many of the bequests of her will, they will make no order as to costs.

Solicitor for the Appellants: Mr. *T. G. Everill.*

Solicitors for the Respondent *Ong Cheng Neo:* Messrs. *Walker & Martineau.*

J. C.* 1875 *June* 9, 10.

JEREMIAH BRASYER . . . . . PLAINTIFF;

AND

HAROLD MACLEAN . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sheriff of New South Wales—Misfeasance—Damages for false Return of Rescue without proof of Malice or want of probable Cause.

Held, that the sheriff of the colony was liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of *capias ad respondendum*, for the damage which resulted to the Plaintiff therefrom. Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the Plaintiff, whom it rendered liable to attachment for a contempt of Court without being allowed to shew that the facts returned were untrue; and constituted a misfeasance by a public ministerial officer in the discharge of his duties.

THIS was an appeal from a judgment of the Supreme Court of *New South Wales* (June 15, 1874), by which the Court set aside a verdict (November 20, 1873), obtained by the Appellant in an action at law brought against the sheriff of the colony for a false return of rescue (1) made by him upon a writ of *capias ad respondendum*, directing him to arrest one *Alexander Coghill Wylie*, by means of which false return, and of an application afterwards made by him, a writ of attachment was issued against the Appellant, who was thereupon arrested, imprisoned, and detained in prison until by leave of the Court he obtained bail, the attachment being ultimately dissolved, and the Appellant discharged out of the

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR HENRY S. KEATING.

(1) See *infra*, p. 403.

custody of the sheriff; and also for falsely and maliciously, and without reasonable or probable cause, charging the Appellant before one of the judges of such Court with having committed a contempt of Court in aiding and assisting the rescue, and upon such charge procuring a writ of attachment against the Appellant, and causing him by virtue thereof to be arrested and imprisoned.

The Respondent (the said sheriff) pleaded (1) a denial of the false return; (2) that the Appellant was guilty of the premises by the return of the writ laid to his charge; (3) not guilty by statute 7 Vict. No. 63, ss. 1, 8; 22 Vict. No. 12, s. 9 (enabling public officers to plead the general issue and give the special matter in evidence).

A verdict for the Appellant (November 20, 1873), was obtained on all the issues, with damages, £500.

On the 2nd of December, 1873, the Respondent obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or to arrest the judgment, pursuant to leave reserved, upon the following main grounds:

1. That the action was not maintainable in the colony, because the bailiffs (mentioned in the return) were not the servants of the Respondent; and that the return to the writ of *capias ad respondendum* was not a return of "rescue," but of "*cepi corpus*," and that therefore the alleged law as to the return of a rescue being a conviction did not apply, and in fact was not law.

2. The Appellant not having been taken into custody under the writ of *capias ad respondendum*, nor affected by anything done under it, could not maintain an action upon the so-called "false return" to the writ, the injury to him having arisen from the judicial act of the Supreme Court, in granting an attachment upon an information by the Respondent, and that to maintain an action in respect of such attachment, malice and want of probable cause were necessary.

3. That the declaration was bad, the return being in law a "*cepi corpus*," and the allegations therein affecting the Appellant being surplusage, and, if false and defamatory, being "*damnum sine injuriâ*," in the absence of express malice.

The Court was unanimous in refusing a rule on the ground that the verdict was against evidence, and on the ground that the damages were excessive.

J. C. 1875 BRASYER v. MACLEAN.

On the 15th of June, 1874, the rule was made absolute to enter a nonsuit; Mr. Justice *Hargrave* being of opinion that the rule *nisi* ought to be dismissed with costs; and Mr. Justice *Cheeke* and Mr. Justice *Faucett* being of opinion that the Appellant ought to be non-suited.

From a comparison of their respective judgments, which, however, it is unnecessary to set out, it appears that they agreed in holding that the Respondent as sheriff of the colony was responsible for the acts of the bailiffs in the execution of the process of the Court, and that the fact of their appointment resting with the governor and executive council did not affect this responsibility.

They further agreed in rejecting the contention of the Respondent that the return was to be considered a return of "*cepi corpus*," and not of "rescue."

But Mr. Justice *Cheeke* and Mr. Justice *Faucett* held that, although the Respondent made a false return, still the arrest of the Appellant was occasioned by the act of the Judge who ordered the attachment to issue, and that unless evidence was adduced that the Respondent had acted maliciously and without reasonable cause in applying for the attachment, he could not be legally made responsible.

Mr. Justice *Hargrave* said that, after attentively considering all the authorities bearing upon this "false return" as to personal conduct of the Appellant, he felt no doubt that the verdict could not be interfered with upon any of the technical grounds mentioned in the rule *nisi*, nor upon any reported case, nor upon any legal principle.

Sir *H. James*, Q.C., and Mr. *F. W. Gibbs*, for the Appellant:—

First: This return was not traversable, and the Court before which it was brought was bound to act upon it and to punish the person returned as the rescuer. So far from the Respondent being protected by the writ of attachment having been issued by the Court, his application that the same should issue was an aggravation of the false return.

They cited *Bacon's* Abridgment, vol. vii. head "Rescue," E. 5; *Davenant* v. *Bishop of Salisbury* (1); *Rex* v. *Elkins* (2); *Comyns'*

(1) 24 Car. 2; 1 Ventris, 224; see also 2 Ventris, 175, n.
(2) 4 Burrell, 2129.

Digest, "Rescous," D. 6; *Rex* v. *Philips* (1); *Rex* v. *Horsley* (2); *Corner's* Crown Practice, p. 32; *King and Queen* v. *Howe* (3). The return is taken as proof against the person returned as rescuer, and he becomes liable to punishment without the right to answer. Although the Court awards the punishment, it is bound by the finding of fact disclosed in the return. The earliest precedent for the action is to be found in *Richardson's* Practice of the Common Pleas, p. 316; *Wentworth's* Precedents, vol. viii. p. 459. An averment cannot be made against a sheriff's return: see Year Books, 5 Edw. 4, 1, and cases there cited.

Secondly: Where the sheriff acts as a ministerial officer, and has the power of making a binding conclusive return, he makes it at his peril, and it is sufficient for a Plaintiff to shew that the same is false without proving either malice or the absence of reasonable and probable cause for making it. They cited *Ashby* v. *White* (4); *Pickering* v. *James* (5). There is no case in which the Court has investigated the question of *bona fides: Turner's* Practice of the Court of Common Pleas [Ed. 1769], p. 545; *Rex* v. *Pember* (6); *Gobby* v. *Dewes* (7); *Dalton's* Sheriffs, p. 189; *Watson's* Sheriffs, p. 94; *Lady Russell and Wood's Case*, A.D. 1589; *Cro. Eliz.*, p. 781. They referred also to *Dyer's* Rep. p. 112; 2 *Salkeld*, 586; *Fawcett* v. *Catta* (8); *Tracy's Case* (9); *Gyfford* v. *Woodgate* (10); *Williams' Saunders*, vol. ii. p. 345.

The sheriff of course, is liable for the acts of his bailiffs: *Woodgate* v. *Knatchbull* (11). [SIR BARNES PEACOCK:—Is not the return bad, that he was rescued out of the hands of the bailiffs, and not out of the hands of the sheriff, and if a bad return, is it conclusive?]

The *Solicitor-General* (Sir *John Holker*, Q.C.), and Mr. *J. C. Mathew* (Mr. *J. Armstrong*, with them), for the Respondent:—

The sheriff is not liable for negligence, unless actual damage is sustained, and a false return by him without consequent damage

(1) Barnes' Notes of Cases, 429.
(2) 5 T. R. 362.
(3) Comberbatch, 295.
(4) Lord Raym. 938.
(5) Law Rep. 8 C. P. 489.
(6) Lee's Rep. t. Hard. 112.
(7) 10 Bing. 112.
(8) Sir T. Jones' Rep. 39.
(9) 12 Mod. 556, 557.
(10) 11 East, 296.
(11) 2 T. R. 148.

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will not support an action against him, and will not entitle the Plaintiff to a verdict even with nominal damages: *Randell* v. *Wheble* (1); *Levy* v. *Hale* (2); *Stimson* v. *Farnham* (3). There is a distinction between the law of the colony and the law of *England* in this matter. The bailiffs in the colony are appointed by the Government, not by the sheriff, though the sheriff puts them in motion. The sheriff, therefore, is not responsible for the acts of his bailiffs. The office of sheriff in the colony exists by force of statutory enactment, and its liabilities must be limited thereby, and are not to be ascertained simply by reference to the common law of *England*. The return, moreover, was of *cepi corpus*, and not of rescue; in the course of making which the sheriff incidentally referred to the rescue. In the absence of malice, the sheriff would not be responsible for a false return so made; he was under no obligation towards the Plaintiff as a third party. The duty was to the Court not to the Plaintiff. In *Wentworth's* Precedents, cited by Appellant, the declaration was that it was done of malice; in *Richardson's*, that it was done deceitfully.

They referred to *Rex* v. *Minisy* (4); *Anonymous* (5); *Miller* v. *Knox* (6); *Rolle's* Abridgment, tit. "Rescue;" *Cooper* v. *Harding* (7); *Williams* v. *Smith* (8); *Daniels* v. *Fielding* (9).

The issue of the writ of attachment was the act of the Court and not of the sheriff. The cases cited on the other side shew that it was the practice to treat the return of the sheriff as one not to be contradicted, and to issue the writ of attachment as of course. That does not shew that the Courts were bound to do so, only that it was convenient. And because they adopted that rule in the exercise of their discretion, they did not abandon their discretion, or render the issuing of the writ the act of the sheriff and not of the Court. Otherwise, if the sheriff has jurisdiction to convict of an offence by his return, he ought not to be deprived of protection for an act done in the exercise of judicial discretion. If his return does not convict, but is traversable, then he is not

(1) 10 A. & E. 719.
(2) 29 L. J. (C.P.) 127.
(3) Law Rep. 7 Q. B. 175.
(4) 1 Str. 642.
(5) 2 Salk. 586.
(6) 6 Scott's H. L. C. 1.
(7) 7 Q. B. 928.
(8) 14 C. B. (N.S.) 596.
(9) 16 M. & W. 200.

responsible. [They referred also to *Comyns'* Digest, vol. vii. p. 276, tit. "Rescous," D. 6; *Rex* v. *Baldwin* (1).]

Sir *H. James*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This was an action brought by *Jeremiah Brasyer* against *Harold Maclean*, who was the sheriff of the colony of *New South Wales*, for a false return of rescue made by him upon a writ of *capias ad respondendum*, which was a mesne process. It appears that the *capias ad respondendum* was issued against *Alexander Coghill Wylie*, at the suit of *George Face*, on the 3rd of March, 1873, and that the writ was delivered to the sheriff to be executed. The sheriff made a return stating that he had "made his warrant in writing, under his seal of office, to *William Thomas* and *Joseph William Delany*, his bailiffs, jointly and severally, to take and arrest the said *Alexander Coghill Wylie*, by virtue of which warrant the said *William Thomas* and *Joseph William Delany* afterwards, to wit, on the 3rd day of March, in the year of our Lord 1873, at *Sydney*, in the colony of *New South Wales*, in his bailiwick, took and arrested the said *Alexander Coghill Wylie* according to the exigency of the said writ, and forthwith delivered to him a copy of the said writ, and safely kept him in their custody until the Plaintiff and divers other persons to the said bailiffs unknown, on the said 3rd day of March, at *Sydney* aforesaid, with force and arms assaulted and ill-treated his said bailiffs, and the said *Alexander Coghill Wylie* out of the custody of his said bailiffs then and there rescued, and the said *Alexander Coghill Wylie* then and there with force of arms violently resisted and assaulted his said bailiffs and rescued himself and escaped out of the custody of his said bailiffs against the peace of our Lady the Queen, and afterwards, to wit, on the 3rd day of March aforesaid, at *Sydney* aforesaid, within his bailiwick, by his said bailiffs took and re-arrested the said *Alexander Coghill Wylie*, and whose body then remained in the prison of our Lady the Queen under his custody." It was contended, in the

(1) Barnes' Notes of Cases, 430.

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course of the argument, that this was a return of *cepi corpus*, and that the sheriff had got the body ready, and that the allegation that it was rescued out of the custody of the bailiffs by the Plaintiff was immaterial and unnecessary. But it appears to their Lordships that it was a material allegation in the return that, although the sheriff afterwards retook the Defendant in the suit, still that the Plaintiff had rescued him out of his custody after he had been once arrested.

On the 4th of March an order for attachment for contempt was issued by a Judge, in consequence, as it is stated, of the "matter being a matter of exigency and emergency requiring a Judge in vacation to exercise the powers of the full Court, under and in pursuance of the powers conferred upon a single Judge in vacation in cases of emergency," and he ordered upon that return, and upon the application of the sheriff, that a writ of attachment should issue against the said *Alexander Coghill Wylie* and *Jeremiah Brasyer*, to be returnable before the full Court on Thursday, the 6th of March. That order having been made by a single Judge, it was afterwards adopted by the Court on the 6th of March, 1873. It is there stated that upon hearing counsel for the above-named applicant, *Harold Maclean*, and upon hearing the affidavit of *David Lawrence Levy*, the Court ordered "that the said order be confirmed and allowed and made absolute, and be and the same is hereby made a rule of this honourable Court." It, therefore, appears that without any cause shewn by the Plaintiff, the Court, by reason of the false return which the sheriff had made to the writ, ordered an attachment to be issued against the Plaintiff. That attachment having been issued, the Plaintiff was arrested on the 6th of March, and was detained in custody until the 7th of March. On that day he was admitted to bail, and on the 11th of March a final order was made, by which he was ordered to be discharged and released from bail.

Now it is impossible to say that no damage was sustained by the Plaintiff in consequence of that arrest. He was apprehended and detained in custody from the 6th to the 7th of March, and he was subject to all the indignity of an arrest, and to the injury to his reputation from having it recorded against him that he had assisted or rescued the prisoner out of the custody of the

sheriff, and that he had been attached for contempt of a Court of Justice.

But it is said that the sheriff is not liable for that act, inasmuch as it is not found or proved that the sheriff acted maliciously. Their Lordships have been satisfied by the cases which have been cited to them that this return of the sheriff was conclusive in that proceeding that the Plaintiff had rescued *Wylie* out of the custody of the sheriff. It is laid down in *Williams' Saunders*, vol. ii. p. 345, in addition to the cases which have already been cited: "It seems that anciently, when the sheriff returned a rescue, the party charged therewith was admitted to plead to it as an indictment"—at that time it was not conclusive evidence of the fact: *Bacon's* Abridgment, tit. "Rescue"—"but it is now held that the return is not traversable." That does not mean perhaps traversable in the form of traversing a return made to a writ of *mandamus*, but when it is said that the return is not traversable it is probably intended that the party is not allowed to shew that the fact returned is not true, "and the party is driven to his action against the sheriff in case the return is false. So that the return itself is considered a conviction"—not an actual conviction, but in the nature of a conviction as conclusive in that particular proceeding of the facts returned by the sheriff—"and the Courts will grant an attachment upon it in the first instance."

Now, their Lordships are clearly of opinion that the Court was not acting contrary to any principle of law, or contrary to an established practice, but that they were acting entirely in conformity with an established practice in issuing an attachment against the Plaintiff upon that conviction without allowing him to shew cause against the truth of the return. This is not a case which falls within the general rule which has been laid down, that no action lies for damage or inconvenience sustained in consequence of process of law, unless it be alleged and proved that the party who occasioned it was actuated by malice. This is a case of a misfeasance by a public ministerial officer in the discharge of his duties. The sheriff was intrusted with the power of making a return to the Court which would be considered conclusive by the Court as to the truth of the facts stated in the return. He was enabled, therefore, by virtue of his office, to make a return to the

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Court in this particular instance, which was conclusive in that stage of the proceedings, that the Plaintiff did rescue *Wylie* from his custody, and he therefore had the power, and he exercised the power of doing that which rendered the Plaintiff liable to an attachment for a contempt of Court without being allowed to shew that the facts returned were untrue.

It appears, therefore, to their Lordships that the sheriff in this case was guilty of a misfeasance in the exercise of the powers which were intrusted to him by law and in the discharge of his duty as a public ministerial officer, and that in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the Plaintiff was sufficient damage to enable the Plaintiff to maintain an action against the sheriff for that misfeasance, and to recover the damage which he has sustained in consequence of it.

Their Lordships, therefore, think that the majority of the Court were wrong in the conclusion at which they arrived, that the action could not be maintained without proof of malice or want of probable cause, and under those circumstances their Lordships will humbly recommend Her Majesty that the decision of the Supreme Court be reversed, and that the rule for a nonsuit should be discharged with costs, and that the Defendant should pay the costs of this appeal.

Attorneys for the Appellant: Messrs. *Wilde, Berger, Moore, & Wilde.*

Attorneys for the Respondent: Messrs. *Peachey & Lloyd.*

MATHIAS F. COURTAUX AND ANTOINE LACOMBE . . . . . } APPELLANTS;

AND

WILLIAM HEWETSON . . . . . RESPONDENT.

J. C.*
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June 22, 23, 24; *July* 21.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Code Napoléon—Sale by Licitation—Unpaid Purchase-money—Privilege of Copartageants—Inscription—Hypothèques—Priority.

The domain of *R. B.*, though consisting of different parcels, was held as one subject, in certain definite but undivided shares, by the *communistes* (some of whom were infants) under titles which were not traced or traceable to a common origin. On the 3rd of May, 1859, it was sold by licitation, *N. C.* and his wife, already entitled to five-eighths share thereof, being declared the purchasers. The purchase-money remaining unpaid, the co-heirs of *P.* and of his wife, being entitled to the three-eighths share which formed the residue of the domain, were entitled to that proportion of the purchase-money.

In September, 1866, the domain was again sold at the instance of *N. C.*'s creditors to the Respondent. The balance of the purchase-money paid by him was claimed by the Appellants, who had acquired by subrogation, in respect of debts incurred by *N. C.* and *P.* jointly, or by one or other of them singly, before the sale of 1859; the rights of *N. C.* and *P.* in the fund. The said balance was also claimed by the Respondent as the assignee of certain creditors of *N. C.*, whose debts were incurred after the sale of 1859.

The co-licitants of 1859, did not inscribe their privilege in respect of the unpaid purchase-money within sixty days, under Art. 2109 of the Code: the Appellants did not after the licitation inscribe their claims against *N. C.* as charges upon the whole estate in his hands; nor their claims against the estate of *P.* as charges upon what might be coming to that estate; but on the 21st of April, 1860, the *Conservateur des Hypothèques, ex officio*, under Art. 2108, inscribed a privilege in favour of the whole body of co-licitants, as unpaid vendors, for the whole amount of the unpaid purchase-money.

The debts in respect of which the Respondent claimed were all duly inscribed as *hypothèques* subsequent to the 21st of April, 1860:—

Held, that by force of the French law relating to "inscription," the Appellants had lost their priority, and that their claims must be postponed to that of the Respondent; because, first, the licitation of 1859 having been purposely taken with a view to a partition and the cesser of indivision between the *communistes*, must be regarded as a partition, and not as a sale; second, the co-licitants were within the principle of Art. 883, and as *copar-*

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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tageants lost their privilege in respect of unpaid purchase-money by their omission to inscribe it within sixty days under Art. 2109; third, although the privilege degenerated into a *hypothèque*, yet the *ex officio* inscription of the 21st of April, 1860, was not tantamount to an inscription of a *hypothèque* under Art. 2148. Such inscription operated as notice that the whole purchase-money was unpaid, but did not confer priority of charge under the Code in respect of a particular share thereof.

THIS appeal was from a judgment of the Supreme Court of *Mauritius*, whereby it was decided that the Respondent was entitled to be paid out of the proceeds of the *Riche Bois* sugar estate, recently the property of one *Nicolas Courtaux*, in priority to the Appellants. The substantial question involved in the appeal was:—

Whether or not the Appellants, who were creditors of *Nicolas Courtaux* and *Auguste Peyras*, by virtue of claims arising in and prior to the year 1859, had upon the facts admitted in the pleadings, and hereinafter stated in the judgment of their Lordships, a preferential lien by way of "*privilége*," "*hypothèque*," or otherwise upon the proceeds of the said *Riche Bois* estate, which had been sold by an Order of Court, so as to entitle them to be paid thereout in priority to the Respondent, who was a creditor of *Nicolas Courtaux*, by the assignment of claims arising subsequently to the year 1859.

The *Riche Bois* estate was sold *en bloc* by "licitation" to *Nicolas Courtaux*, at that time owner of five-eighths thereof, on the 23rd of May, 1859, for $230,000. He did not pay the price down, and no registration was made within sixty days, as prescribed by Art. 2109 of the Code, of any lien upon the estate in favour of the co-licitants. But the Master, upon making, in May, 1859, the adjudication of *Riche Bois* to *Nicolas Courtaux*, made thereon a memorandum of the conditions of sale, and about a year afterwards, on the 21st of April, 1860, the adjudication with this memorandum was presented to the *Conservateur des Hypothèques, Mauritius*, who entered the same upon the register.

That inscription was as follows:—

"At the date of the 21st of April, 1860.

"Inscription taken *ex officio* on behalf of [here follow the names of all the co-licitants]. In virtue of a memorandum of adjudica-

tion made before the Master of the Supreme Court of *Mauritius*, on the 3rd day of May, in the year 1859, registered on the 23rd day of the aforesaid month and year, and transcribed this day, vol. lxix., No. 301, and containing sale by licitation of the immoveable property hereafter described, for the sum of $230,000, being the amount of the said adjudication at the *Cahier des Charges*, it has been stipulated as follows: "Art. 5.—The purchaser shall be bound to pay his purchase-money according to the deed of partition which will be made between the co-licitants, pursuant to law, of the said purchase price, or, if necessary, according to the plan of distribution which will be made by the master of such sale price, pursuant to law, upon presentation of warrants for payment, which may be issued by the said master, in consequence of the final closure of such plan of distribution, or in obedience to any judgment of the Supreme Court of *Mauritius* which may be made to share and divide the said purchase price. The purchaser shall besides pay interest upon the sale price at the rate of nine per centum per annum from the sale until final payment, and as security from the risk of an insolvent purchaser is not the only object which is aimed at, the purchaser or purchasers, whether he or they bids or bid in person, shall be bound, if so required to do, to deposit cash in the hands of the master, at the very time of the adjudication, one-sixth of his or their purchase price, and all the costs of sale, and in case of deposit, such portion of the purchase price as shall not have been deposited shall bear interest as above set forth, and in case the purchasers or purchaser be one or more of the co-licitants, he or they shall be entitled to deduct from the sum to be deposited his or their share or shares in the said sum. Privilege on several portions of land situate in the district of *Savanne*, in this island of *Mauritius*, containing altogether 1674 acres or thereabout in extent, worked as one single estate, and known under the name of *Domaine de Riche Bois;* these several portions of land are" [here follows description of the portions and the boundaries].

On the 20th of September, 1866, the *Riche Bois* estate was again sold in the course of proceedings instituted by the creditors of *Nicolas Courtaux* to *William Hewetson*, the Respondent, for $215,000, which was paid. As regards $168,000, which was

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applied in payment of preferential charges, no dispute arose; but as regards the balance of $47,000, it was claimed as follows:—The Appellants, *M. F. Courtaux* and *Antoine Lacombe*, were two creditors of *Nicolas Courtaux* and *Auguste Peyras* for $45,000 or thereabouts, upon accounts stated prior to the sale of 1859, and in respect of transactions which had occurred prior thereto. The Respondent *Hewetson*, who was also the purchaser at the sale of 1866, claimed as assignee of certain judgment and mortgage creditors of *Nicolas Courtaux*, whose claims, amounting to $43,000 or thereabouts, originated subsequent not only to the sale of 1859, but also to the inscription of the 21st of April, 1860. All those claims were however duly registered.

The Master of the Supreme Court of *Mauritius* in the course of his official duty proceeded to distribute the purchase-money, and on the 26th of June, 1872, delivered his judgment, deciding that the Appellants were entitled to priority over *Hewetson*. He said: "I consider that the inscription taken *ex officio* on the 21st of April, 1860, although without effect to preserve the privilege attached to the claims of the heirs and representatives, *Peyras* and wife and other co-licitants, must have its full effect as an inscription of the mortgage attached to the said claims, and that, therefore, the creditors, heirs, and legatees of the said "co-licitants" must take rank in the present distribution of the sale price of *Riche Bois*, according to their respective titles and capacities, before the personal creditors of the purchasers, *Courtaux* and wife, whose claims have been inscribed after that date, provided, however, that they hold legitimate titles as such creditors, heirs, and legatees, for the discussion of which I postpone the case to the 10th day of July next, without any further notification."

From this judgment *Hewetson* appealed to the Supreme Court, who, on the 26th of April, 1872, reversed the Master's decision, and held that the Appellants must be postponed to *Hewetson* on the following grounds:—

"1. That the proceedings in 1859, by which *Nicolas Courtaux* became owner of the whole of *Riche Bois*, were not a sale but a partition.

"2. That *Nicolas Courtaux* and his co-owners were '*cohéritiers*' within the meaning of that term, as used in sect. 883 and the other

sections in the *Code Civil* relating to '*successions*,' and that the transfer to *Nicolas Courtaux* was an '*acte déclaratif*,' and not an '*acte translatif*' of title."

"3. That consequently the only '*privilége*' preserved to the prior creditors of the *Riche Bois* estate was the '*privilége*' of a '*cohéritier*,' which required to be registered within sixty days of the transaction.

"4. That the inscription taken by the Conservator of Mortgages was void to all intents and purposes. As to this the Court said, 'The inscription was taken *ex officio* by the Conservator of Mortgages as such, and not at the "*diligence*" of the co-licitants or *co-partageants*. The inscription was taken by the latter long after the sixty days from the date of the judgment of adjudication. The necessary *sequitur* therefore is that the Respondents (*i.e.*, the present Appellants) have lost their privilege, and that the finding of the Master on this head in favour of the Respondents must be set aside. Assuming, for the sake of argument only, that the Conservator, like any third party, was fully warranted by law to step into the relief of a negligent *copartageant* or co-licitant—a point upon which we do not think it necessary at present to give any opinion—it is clear that assistance should be afforded so as effectually to benefit the party whose interest he is anxious to serve, but instead of taking an inscription as *negotiorum gestor* upon the authority of Art. 2,148, *Civil Code*, the Conservator has taken an inscription *ex officio*, which, however beneficial for the protection of a vendor's privilege, can in no wise secure the privilege of a co-licitant or *copartageant*."

Mr. *Fry*, Q.C., and Mr. *Seward Price*, for the Appellants:—

The proceedings in May, 1859, by which the entirety of the estate of *Riche Bois* was transferred to *Nicholas Courtaux*, constituted a sale and not a "*partage*," and consequently the entry made by the "*Conservateur des Hypothèques*" on the 21st of April, 1860, was the entry of a vendor's "*privilége*," which the Conservator was bound to make *ex officio*, and was perfectly good as such, and enures for the benefit of the Appellants and other creditors of *Peyras*, the owner of the estate. [They referred to sect. 1686 of the *Code Napoléon*; sect. 1998 with the note thereto by *Sirey*; sects. 2103,

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2106, 2108, 2109, 2113, and 2148.] The effect of these sections is to give to vendors at a sale and to co-owners on a partition a lien for the unpaid purchase-money, and other undischarged claims existing against the property so disposed of, provided only that the lien is duly registered. The lien so arising in its primary form is styled a "*privilége*," but the conditions and formalities as to registration must be observed and carried out in order to preserve its full effect. If these conditions and formalities are wanting, the lien is not altogether lost, but it degenerates into a "*hypothèque*," or secondary lien, which nevertheless gives priority to most if not all liens subsequently registered. Apart however from any question as to the nature of the transaction of 1859, whether it be called a sale or a "*partage*," the 5th condition of transfer expressly constituted a lien either "*privilége*" or "*hypothèque*" enforceable in Appellants' favour. The claims mentioned in such condition include the Appellant's claims, and again the question is reduced to whether due registration of such lien had been effected so as to secure a legal priority.

As to registration, it was effected as of a vendor's privilege after the expiration of sixty days *ex officio* by the *Conservateur des Hypothèques*, and not as a *hypothèque* by a *créancier*. It was good as the registration of a vendor's privilege: (1.), because the transaction of 1859 was a sale; (2.), because even if it were a "*partage*," yet *Nicolas Courtaux*, being only a tenant in common, and not a "*cohéritier*," of *Riche Bois*, it was not an ordinary "*partage*," by co-heirs or joint tenants, but a "*partage*" by tenants in common, which *partage* is in the nature of a sale, and is an "*acte translatif*," and not merely "*déclaratif*" of title, and produces in favour of the selling parties and those claiming under or through them a vendor's privilege. In any event it is good as the registration of an *hypothèque;* for, on the assumption that the transaction of 1859 was a *partage*, and that the *copartageants* lost their privilege by omitting to register it in sixty days, yet (see sect. 2113) they retained their "*hypothèque*," into which the privilege for want of prompt registration degenerated, and consequently the entry by the "*Conservateur des Hypothèques*," which entry contained all the requisites imposed by sect. 2148, is perfectly good as the entry of "*hypothèque*," and enures to the benefit of the Appellants.

According to French law, every privilege is a *hypothèque*, though every *hypothèque* is not a privilege: see *Troplong* [3rd Ed.], "*Priviléges et Hypothèques*," vol. i. p. 24, § 27; p. 493, § 318. And upon sect. 2148, see *Troplong*, vol. iii. §§ 667–8, 673; *Les Codes annotés de Sirey*, sect. 2148, notes 63—68 [Ed. 1871]. They referred to sects. 2103 and 1476; *Sirey*, 1841, part 1, page 731. There is express provision in so many words to meet the case of co-owners who are not also co-heirs. They are included in the clause as to vendors, at least whenever the partition by them is not a division in kind, but by a sale and division of proceeds. Even in the case of *cohéritiers*, where the parties intended it to be a sale and not a *partage*, all the consequences of a sale follow: *Dalloz*, 1845, part 1, p. 376–7. The question is one of intention: *Dalloz*, 1847, part 2, p. 103; *Ibid.* 1851, part 2, p. 85; *Ibid.* 1855, part 2, p. 356. As regards sect. 883, which the Supreme Court held to be applicable to the case, and destructive of *Nicolas Courtaux's* title under the proceedings of 1859 in his character of an ordinary purchaser, that section is, according to its true construction, a special provision for joint tenants who are also co-heirs, and cannot apply to persons whose estates are intermingled, or to ordinary tenants in common. As regards these latter, see sects. 573, 575, 1686. There is no reference in sect. 883 to *copartageants*. If, nevertheless, it applies to *copartageants*, it must be when the title is common to all as amongst joint tenants. They referred to *Sirey*, 1849, 21st note of Appendix; *Sirey*, 1858, part 1, p. 767; *Ibid.* 1870, part 1, p. 270; *Ibid.* 1848, part 1, p. 61.

Mr. *Matthews*, Q.C., and Mr. *Myburgh*, for the Respondent:—

There is no difference existing under the law of *Mauritius*, such as is known in English law, between joint tenants, tenants in common, and coparceners. The law of *Mauritius* recognises separate and joint ownership simply. The character of joint ownership is identical in all cases, though the consequences which flow from its dissolution may differ in different cases. The joint ownership in this case was of a complicated kind, but any co-owner could demand a division. When the joint property is knocked down to one of the joint owners, he is deemed to have been sole owner from the beginning; a fiction of law which originated in general

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convenience, and to avoid the feudal dues. [SIR MONTAGUE E. SMITH:—He is in as of the old estate.] The number of cases cited on the other side of cession of his rights by one co-owner to a stranger only shews that the stranger takes an undivided share, and is co-owner with the others.

The whole of the elaborate argument on the other side, to the effect that the proceeding of 1859 was in intention and in fact a sale, falls to the ground. See articles of the Code on Licitation, 1686, *et seq.*, and the head-note thereto in *Rogron's* annotated edition. Compare Articles in reference to *partage*, 827–839. See also sect. 882, 11th note (*bis*) thereon by *Sirey* [Ed. 1855]. See also articles on licitation in the *Procedure Code*, 966, 705, 707 of the Code as remodelled in 1841 (corresponding to Arts. 965, 707, and 709 of the old Code, which is still in force in *Mauritius*). A licitation ending in an adjudication to one of the co-owners is not an act which transfers property, but one which, by fiction of law, fixes the co-owner as sole owner from the beginning. The Master's adjudication in this case was not "*translatif de propriété*," *i.e.* did not convey to *Courtaux* and his wife; but was "*déclaratif de propriété*," owing to the rule laid down in sect. 883 of the Code, as to *partages* or *licitations* between joint heirs, which rule extends to similar operations between any other class of joint owners of real property: see Arts. 1476, 1686, 1688, 1872, and 2109 of the Code. The same rule prevailed at Common Law in *France* previous to the codification of its laws. See *Pothier, Contrat de Vente*, vol. ii. part 7, art. 7, "*Des Licitations entre cohéritiers et copropriétaires.*" It was not therefore a contract of sale either in law, in intention, or in fact; the adjudicatee being deemed to be sole owner *ab initio*, with the consequences which flow from that fiction. [SIR MONTAGUE E. SMITH:—*Pothier* seems to be speaking of a sale amongst co-owners in which outsiders are not admitted to bid; that, no doubt, would operate as a partition]. But see as to the effect of Art. 883, "*Delvincourt, Cours de Droit Français*," vol. ii. p. 53 *et seq.* [Ed. 1834], par. 5, tit. "*Des Successions*;" *Marcadé, Droit Civil Français* under Art. 883, *Civil Code*; *Durante, Cours de Droit Français*, vol. ii. sect. 225, *et seq.*; *Rogron* on Arts. 883, 1872, 1832, and 1841 of the Code; *Troplong, Droit Civil expliqué des Sociétés Civiles et Commerciales, tit.* "*Du*

Contrat de Société," Art. 28 ; *Demolombe, Successions*, vol. v. Nos. 253, *et seq.* 264, 266 ; *Mourlon's Code Napoléon*, vol. ii. p. 483.

Such a fiction, with its consequences, would be serious to co-licitants and their mortgagees or creditors, had not the law interfered for their protection. See Arts. 2109, 2113, 1166, and 788 of the *Civil Code*. Under these articles the Appellants, as alleged creditors of certain co-licitants, could have secured any rights, either of privilege or mortgage, accruing to their supposed debtors in respect of the Master's adjudication. But no co-licitant's privilege was inscribed within sixty days under Art. 2109, nor the co-licitants' mortgage under Art. 2113, either at the request of the co-licitants themselves, or any of their alleged creditors. If the vendor's privilege is duly inscribed, it can be transcribed at any distance of time ; it never degenerates into *hypothèque ;* it never merges ; it remains a complete charge, or disappears altogether : *cf.* Arts. 2113, 2134, and 2155 of the Code.

As to the effect of the *ex officio* inscription by the *Conservateur des Hypothèques*, he is a public officer, whose functions are both ministerial and fiscal. He has two sets of registers for transcription and inscription. Under the law as it stood in *Mauritius* in 1860, few deeds (chiefly under Art. 939 *et seq.*, and Art. 1069 of the *Civil Code*) required to be transcribed in order to be valid ; with regard to others, transcription was optional. As to inscription, Art. 2108 specially refers to a vendor's privilege. Even that is quite independent of the *ex officio* inscription, which is only intended to give warning that a vendor's privilege *pre-exists*, and has been secured by *transcription*. Were it omitted altogether, the vendor's privilege would still hold good as soon as the deed of conveyance is transcribed at the request of either vendor, lender, or purchaser. Under Art. 2108, it would be held to be duly inscribed so as to comply with the requirements of Art. 2106. The *ex officio* inscription was therefore never intended to secure any rights either to vendor or lender, and, *à fortiori*, could not secure any to co-licitants, whose case is not even contemplated by Art. 2108. See *Troplong's Droit Civil expliqué*, "*Priviléges et Hypothèques*," vol. i., Art. 275–7 ; 278–286 ; 290–1 ; *Pont, Explication du Code Civil*, "*Des Priviléges et Hypothèques*," vol. i., par. 268, *et seq.*, and vol. ii., art. 933. See also *Sirey*, 1845, part 2, p. 426 ; *Sirey*, 1855, part 2,

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p. 512; *Ibid*, 1831, part 2, p. 241; *Ibid.* 1854, part 2, p. 350; *Troplong, Droit Civil expliqué*, vol. xvi.; "*Du Mandat*," par. 617, *et seq.*; *Sirey*, 1817, part 1, col. 148; *Ibid.* 1832, part 1, p. 481; *Ibid.* 1840, part 1, p. 686. As to the *Dalloz*' cases cited on the other side, they are all cases of cession by a co-heir or co-owner of his undivided right to a third person. Such cession ends the *status* of indivision, and therefore amounts to a partition. Then where the intention is a sale, it is a sale. But there is no case to shew that a licitation, followed by an adjudication to a co-licitant amounts to a sale.

Mr. *Fry*, Q.C., replied. With regard to the fiction of law relied on upon the other side, wherever the Code intends that fiction to apply, it applies it in express terms, and the inference is, that when the Code is silent the fiction does not apply. This was a case of sale, and the vendor's privilege is independent of registration. Sect. 2113 provides for that omission, and sect. 2148 does not contain any declaration of nullity in case of omission. He referred to *Troplong's Du Contrat de Société*, vol. i., art. 1832, par. 22, p. 31; *Dalloz*, 1849, part 2, p. 184. Art. 883 does not apply; see *Sirey's* notes thereto.

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The judgment of their Lordships was delivered by

SIR JAMES COLVILE:—

The question raised by this appeal is one of priority between the charge of the Appellants and that of the Respondent upon a sum of $47,000, the balance of the purchase-money of an estate in the Island of *Mauritius*, known as the *Riche Bois Domain*.

The whole of this estate, which consisted of ten different parcels, had before the year 1858 become vested in and was held by certain persons in community; three-eighths belonging to *Nicolas Courtaux* and his wife, living together under the "*régime de communauté des biens*;" three-eighths to *Jean Auguste Peyras* and his wife, living together in the like community; and two-eighths to one *Robert Brenan*.

In August, 1858, both *Peyras* and his wife were dead, and their three-eighths had passed to their heirs. On the 18th of December, 1858, *Nicolas Courtaux* purchased *Brenan's* two-eighths, and thereafter the estate belonged as to five-eighths to *Courtaux*, or to

Courtaux and his wife, who for the purposes of this appeal may be taken as one person in law; and as to three-eighths to the co-heirs of *Peyras* and the co-heirs of his wife in their respective proportions.

On the 20th of December, 1858, and apparently before the completion of the purchase by *Courtaux* of *Brenan's* share, certainly before its inscription, proceedings with a view to a partition of the estate, or its proceeds, were commenced at the instance of one of the heirs of Madame *Peyras;* and on the 22nd of February, 1859, the Master, on the report of the person who had been appointed by the Court to determine whether the estate could or could not be conveniently divided in kind, and if not, to make the valuation thereof, ordered that the sale by licitation of the estate *Riche Bois* should take place before him according to law.

The estate was accordingly put up for such sale, according to certain conditions of sale, on the 3rd of May in that year, and was knocked down to Mr. *Edward Duvivier,* the attorney having the carriage of the sale, for the sum of $230,000. He afterwards declared his principals to be *Nicolas Courtaux* and his wife, who were, therefore, duly adjudged to be the purchasers.

There seems to their Lordships to be no pretence for treating the transaction as a sale to *Duvivier.*

Under the fifth of the conditions of sale the purchaser was bound to pay the sale price according to the deed of partition which might be made between the co-licitants, pursuant to law; or, if necessary, according to the plan of distribution which should be made by the Master of such sale price, pursuant to law, upon the presentation of warrant for payment to be issued by the Master, in consequence of the final closure of such plan of distribution, or in obedience to any judgment of the Supreme Court of *Mauritius,* which might be made, to share and divide the said sale price. He was to pay interest upon the unpaid purchase-money at the rate of 9 per cent. per annum from the day of sale until final payment. He might also be called upon to deposit one-sixth of the sale price and all the costs in the hands of the Master, subject to the provision that in case he should be one of the co-licitants, he should be entitled to deduct from the sum to be deposited his share in the said sum.

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Several of the co-licitants being infants, it was necessary that the Master should make a plan for the distribution of the sale price. It appears, however, that no proceedings with that object were had for some years, and that in the meantime *Nicolas Courtaux* and his wife were in possession of the estate, without paying into Court or otherwise any portion of the purchase-money.

In September, 1866, the estate having been seized at the suit of some creditors of *Nicolas Courtaux*, was again put up for sale, and was purchased by the Respondent for the sum of $215,000. On this occasion the purchase-money was paid into Court, to be apportioned by the Master amongst different claimants, including the co-licitants upon the first sale. It may be assumed to have been properly applied in the payment of preferential charges to the amount of $168,000, leaving only the balance of $47,000 to satisfy the conflicting claims of the Appellants and the Respondent, and claims posterior to them.

The claims of the Appellants are in respect of debts incurred by *Nicolas Courtaux* and *Jean Auguste Peyras* jointly, or by one or or other of them singly, before the sale by licitation in May, 1859. The Appellants may be taken to have acquired by subrogation, to the extent of their respective charges, all the rights which either of their debtors, or his representatives, could have asserted against the fund. And in so far as they are creditors of *Peyras*, they are entitled to the benefit of any charge which he or his representatives had upon the estate in respect of his unpaid share of the purchase-money due on the first sale.

The Respondent claims as the assignee of certain creditors of *Nicolas Courtaux*, whose debts were incurred after the sale by licitation to him and his wife.

It follows from this statement that the claims of the Appellants would be preferable to that of the Respondent, unless it can be shewn that, by force of the French law relating to "inscription," the Appellants have lost their priority, and their claims have become such as must now be postponed to that of the Respondent.

The three material Articles in the *Civil Code* relating to "inscription" are the 2108th, the 2109th, and the 2148th. It may be necessary hereafter to consider more particularly their terms.

At present it is sufficient to state their general effect. The object of the first is to preserve and record the privilege of an ordinary vendor, which it does by providing that the transcription of the purchaser's instrument of title shall, in so far as it shews that the whole or part of the purchase-money is unpaid, operate as an inscription of the vendor's privilege or lien; but that the Registrar (the "*Conservateur d'Hypothèques*") shall nevertheless make *ex officio* upon his register an inscription of the charge resulting from the conveyance in favour of the vendor, who may also, in order to secure such inscription, cause the conveyance to be transcribed, if it has not been transcribed, at the instance of the purchaser. The object of the second of these Articles is to preserve the privilege of co-heirs, or of such other co-proprietors, as are within the meaning of the term "*copartageants.*" And the object of the last is to prescribe the mode of effecting the inscription by a creditor entitled to an ordinary *hypothèque* of such *hypothèque.*

The debts in respect of which the Respondent claims were all duly "inscribed" as *hypothèques* under this 2148th Article, the earliest of such inscriptions being dated the 23rd of October, 1860, and he may be taken to have thus acquired a valid charge on the fund, which is entitled to priority over all other charges by way of mere *hypothèque,* that were not duly inscribed before that date.

The inscription upon which the Appellants rely is that of the 21st of April, 1860. It purports on the face of it to be an inscription taken *ex officio* on behalf of all the co-licitants, including *Nicolas Courtaux* and his wife, and also *Robert Brenan,* either as actual co-proprietor, or as one who had inscribed his privilege as unpaid vendor against *Nicolas Courtaux* as the purchaser of his share; it refers to the memorandum of adjudication made before the Master on the 3rd of May, 1859 (which contains all the proceedings relating to the sale by licitation); it sets out the fifth of the conditions of sale; and it records a privilege apparently in favour of the whole body of co-licitants, treating them as unpaid vendors for the whole amount of the unpaid purchase-money, viz., $230,000. Looking at the document itself, and to the evidence of the officer as taken before the Judges of the Supreme Court, their Lordships have no doubt that this inscription was, in fact, made by him *ex officio* as the legal consequence of the

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transcription of the memorandum of adjudication (the "title" of the purchaser), and under the 2108th Article of the *Civil Code*.

In this state of things the Respondent contends that the co-licitants, the estate having, on the sale of May, 1859, been adjudged to two of them, had not the privilege of ordinary vendors, but at most that of "*cohéritiers*," or "*copartageants*," which, under the 2109th Article, they were bound to inscribe within sixty days; and further, that the inscription of the 21st of April, 1860, was but the record of a privilege which did not exist, and cannot avail for any other purpose.

On the other hand, it is insisted on behalf of the Appellants that the transaction of May, 1859, is to be deemed a sale which gave to the co-licitants the ordinary privilege of unpaid vendors; but that even if this be not so, and the co-licitants are to be regarded only as "*copartageants*" who failed to inscribe their privilege within the sixty days, they, nevertheless, under the 2113th Article of the *Civil Code*, retained the rights of creditors by *hypothèque*; and that the inscription of the 21st of April, 1860, must be taken to be equivalent to an inscription of such legal *hypothèque* at that date.

The Master, on the last ground, but upon that only, decided that the creditors, heirs, and legatees of the co-licitants were entitled to rank in the distribution of the fund before the personal creditors of the purchasers, *Nicolas Courtaux* and wife. But the Supreme Court overruled his finding, holding that the inscription of the 21st of April, 1860, was of no effect.

The first question to be determined by their Lordships is, what was the true character of the transaction of May, 1859. Was it a sale which gave to the co-licitants the privilege of ordinary vendors, or was it such a licitation as gave to them no higher privilege than that of "*copartageants*," which they were bound to inscribe within sixty days, under Art. 2109, *Civil Code?*

Before considering the Articles of the Code which are supposed to bear upon this subject, and in particular the scope and operation of the 883rd Article, their Lordships think it will be advisable shortly to examine how far the principle for which the Respondent contends was adopted and enforced in the ancient jurisprudence of *France*, to which such frequent recourse is had by the modern

commentators of the Code for the correct interpretation of its Articles.

It will be seen, by reference to *Pothier, Traité de Vente, partie* VII., Arts. 6 and 7, and other authorities, that the law of *France* differed from the Roman law in its view of the nature and effect of a partition. The Roman jurists considered it to be a species of exchange, involving, like an exchange between strangers, many of the consequences of a sale, and notably this, viz., that a creditor of one of the co-proprietors would retain upon the shares of all after division any charge by way of "*hypothèque*" that had been created by his debtor before the division.

The doctrine of the old French law was, on the other hand, that a partition had no relation either to the contract of exchange, or to the contract of sale; that it was not in the nature of a purchase-deed ("*titre d'acquisition*") but only had the effect of determining and limiting to certain subjects the indefinite share which, before the partition, each co-heir or other co-proprietor had in the mass of the property divided. According to the distinction to be found in the writings of so many French jurists, and in the Code itself, the instrument of partition was "*un acte déclaratif*," not "*un acte translatif de propriété.*"

Pothier also shews that the consequences of a partition differed in various other particulars, besides that relating to incumbrances, which has been already mentioned, from those of a sale or exchange; as, for instance, in the warranties resulting from the respective contracts, and in the right of rescission. And although he mentions that it was ruled by the Custom of *Orleans* that the property divided was not, by reason of the partition, subject to feudal dues, he treats that exemption as a consequence of the established distinction between a partition and the other contracts; and not, as it was put in the argument, the result of a mere fiction of law, devised originally in order to evade such dues, and afterwards adopted as an established principle of French law.

It was, however, one thing, as *Demolombe* observes ("*Traité des Successions*," vol. iii. p. 291) to give this effect to a partition in kind, and another to give it to a licitation which has so many of the characteristics of a sale; and which, when strangers are admitted to bid, may always result in an ordinary sale.

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Pothier, however, in the 7th Article above referred to, shews that this was so under the old law. After defining licitation, he says, "*Lorsque c'est l'un des cohéritiers ou copropriétaires entre lesquels la licitation se fait, qui est adjudicataire, la licitation, quoiqu'elle ait l'apparence d'un contrat de vente, n'est pas néanmoins contrat de vente. Cette licitation tient lieu de partage, et n'est autre chose, de même que le partage, qu'un acte dissolutif de communauté.* And, after applying this to co-heirs, he proceeds: "*Il en est de même des autres copropriétaires. Lorsque plusieurs légataires, ou plusieurs acquéreurs, licitent entre eux un héritage qui leur a été légué en commun, ou qu'ils ont acquis en commun, celui d'entre eux qui s'en rend adjudicataire, est censé avoir été directement légataire ou acquéreur du total de l'héritage, à la charge seulement de faire raison à ses colégataires ou coacquéreurs de leur part dans le prix auquel l'héritage serait porté par licitation qui en serait faite entre eux.*"

It is impossible to read these two chapters in *Pothier* without coming to the conclusion that, according to the old law of *France*, a partition was treated as a transaction perfectly distinct in its nature and consequences from a sale or exchange, and that a licitation had in order to a partition, if the property was purchased by a co-licitant, and not by a stranger, was treated as only a step towards a partition, and involved the same consequences.

When, therefore, the Code enjoins, as in Arts. 1686 to 1688, that a subject which cannot be conveniently divided in kind among "*copropriétaires*" shall be dealt with by licitation, a strong presumption arises that it was not intended, unless the intention were expressed, to change the old law of licitation, and still less to change the law as to some, but not as to all, classes of co-licitants.

The difficulty no doubt arises from the terms of the 883rd Article, and its place in the *Civil Code*. These, if considered alone, might lead to the conclusion that both the article and the principle which it embodies were intended to be applied only to the co-heirs entitled to share in the succession of one naturally or civilly dead. That they have, however, a more general application, is shewn by the 1476th and 1872nd Articles of the Code, which expressly extend their operation, the first to spouses living

in community, the last to whatever classes may be comprehended in the term "*associés.*"

It was argued that the expression of these two classes implies the exclusion of all other *copropriétaires.* The argument would be of weight if the whole French law were to be taken to be expressed in the Code, and if we were bound to apply the English rules of construction to what is so expressed. But it is impossible to read the voluminous commentaries on the Code, which have proceeded from authors of the highest authority, without seeing that this is not the view taken of their law by French jurists. M. *Demolombe,* in commenting upon the 883rd Article ("Successions" vol. iii. p. 332), argues from the very Articles above-mentioned that it was not the intention of those who framed the Code to depart from the old law relating to partition and licitation as a step to partition, and in favour of the conclusion at which he finally arrives, viz., that the rule of declarative partition recognised by the 883rd Article in the case of the partition of a succession, is applicable to the partition "*de toute universalité, quelle que soit la cause de l'indivision,*" and even to the partition "*des choses singulières, et individuellement considérées.*"

This conclusion is supported by other authorities, as, for instance, by the 22nd note on Art. 883 in *Sirey's* Supplement, which says: "*La fiction de l'Article* 883 *n'est pas exclusivement applicable au cas de partage ou licitation entre cohéritiers; elle est également applicable au cas de partage ou licitation entre simples communistes,*" and refers to various decisions in support of that proposition.

It was, however, argued by the learned counsel for the Appellants that even if Art. 883 be taken to be applicable to classes of "*communistes,*" other than those to whom it is expressly made applicable by the Code, it must be taken to be applicable to such only as hold their undivided property "*d'un titre commun;*" and that the co-proprietors of the *Riche Bois* domain did not fall within that category.

This argument, which seems to admit that Art. 883, *Civil Code,* is *primâ facie* applicable to all whose property can be the subject of licitation under Arts. 1686–1688, *Civil Code;* imports an exception to the rule which is not expressed by the Code.

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The authority chiefly relied upon in support of the argument was the case decided at *Douai* on the 2nd of May, 1848, and reported in *Dalloz, Jur.* 1849, *partie* 2, p. 184.

The facts of that case were the following:—The widow *Cailleux* and her children were undivided proprietors of the domain of *Mouriez*, which in 1814 was sold to one *Pannier*.

One of Madame *Cailleux's* children, *Étienne*, had several daughters, who, as the representatives of their deceased mother, had acquired a charge by way of *hypothèque* on his share.

Another of her children was a Madame *Le François*, who was not a party to the sale, but whose ratification of it the other vendors undertook to procure. But for this circumstance it would have been impossible to argue that the transaction of 1814 was anything but a sale to *Pannier*, a stranger.

In 1831 *Étienne*, as the heir of Madame *Le François*, ratified on her part the transaction of 1814, and this completed the title of *Pannier* to the whole estate.

In 1848 the daughters of *Étienne* sought to recover their debt, which had been duly inscribed as a charge on their father's share in the estate, and as a step thereto sued *Pannier* for a partition or licitation of the property under Art. 2205, *Civil Code*.

Pannier made several defences. He contended, first, that the transaction of 1814 was in its nature and effect a partition and not a sale; that he was, therefore, entitled to the benefit of Art. 883; and that the creditors of *Étienne* could not follow the estate in his hands; secondly, that even if the transaction of 1814 was in its nature a sale, yet inasmuch as it was not ratified by the heir of Madame *Le François* until 1831, there existed indivision between him and her from 1814 to 1831, and that consequently the ratification had the effect of a partition between *communistes* giving him, if he had it not before, the benefit of Art. 883; and thirdly, that the action under Art. 2205, would not lie; that Article applying only to a case of indivision between co-heirs, and not to that of indivision between proprietors holding by different titles; and the proper remedy of the Plaintiffs, if they had any rights against him, being by seizure, and not by a demand for partition.

The Courts rejected the first defence on the following ground:—"*Attendu que pour qu'il y ait lieu à l'application de l'Article* 883

entre associés, comme entre cohéritiers, et même entre communistes, *il faut que les associés ou communistes tiennent leurs droits d'un titre ou d'une origine commune existant antérieurement à l'acquisition que fait l'un d'eux de la part indivise de son copropriétaire, que ce n'est que dans ce cas que la fiction créée par l'Article* 883 *doit avoir effet.*" And they applied this principle by shewing that *Pannier*, before the transaction of 1814, had no right in the property, either as co-heir, as partner (*associé*), or communist, but was only a third party purchasing; and that his contract could not be said to cause a state of indivision to cease, inasmuch as no such state existed between him and his vendors.

The decision on the second defence was, that the ratification of 1831 must also be treated as a sale; that the portion of the estate which *Pannier* already held he held as vendee, and not by the same title as the heir of Madame *Le François*. And the judgment added this further reason, "*Attendu, en outre, qu'il est de principe que l'acquisition faite par un tiers déjà acquéreur de plusieurs parts, de la dernière part d'un immeuble, quoique faisant cesser, l'indivision n'est pas considérée comme un acte équivalent à partage, et ne doit pas par conséquent recevoir l'application de l'Article* 883."

Upon the third point the Court held that the creditors were entitled under the 2205th Article, to call upon *Pannier* to ascertain by partition or licitation their father's share, on which their charge existed. It is not necessary to consider how far this ruling was consistent with what had been laid down as to the two other points. But one passage in the judgment of the Court supports what has been said above as to the latitude with which the articles of the *Civil Code* are interpreted and applied by the French Courts and jurists. It is, "*Attendu que l'Article* 2205 *du Code Civil est aussi applicable au communiste que l'est l'Article* 883 *du même Code, aucun article de ce Code n'ayant de dispositions spéciales sur la question qu'il s'agit.*"

The "*res decisa*" in the case just stated, certainly does not govern the present. It was merely that the state of indivision must exist between the acquirer and those from whom he acquires the property before the date of the acquisition; and further that the ratification was but the completion of the former transaction of sale, not a new transaction in the nature of partition.

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The domain of *Riche Bois*, though consisting of different parcels, had before 1866 been consolidated as one subject. It has, throughout the proceedings, been treated as one subject held in certain undivided shares by the *communistes* or co-proprietors, and as such to be the proper subject of partition by licitation. The parties were ascertained, their shares were defined, and they held the whole subject according to their shares in a state of community or indivision. It does not appear to their Lordships that there is any authority for holding that the licitation was in itself improper, or that it did not involve the ordinary consequences of a licitation with a view to a partition and the cesser of the indivision, because the different parcels of which the subject was composed were originally acquired by the co-proprietors under titles that cannot be traced to one common origin.

Another class of cases cited, as, for example, the two in *Dalloz, Jur.* 1845, pp. 376 and 377, only shew that even amongst co-heirs, and, *à fortiori*, amongst other co-proprietors, there may be cessions intended to take effect as sales, and not as partitions, and that when this intention is clearly shewn, the Court will give effect to such transactions as sales, involving all the consequences of a sale. One, and the principal criterion, for determining whether a particular act is to be treated as a sale or as a partition, seems to be this, viz.—is its object to cause the state of indivision to cease? In the present case all the proceedings were taken with that object, and that object alone.

Upon the whole, then, their Lordships are of opinion that the preponderance of the French authorities is in favour of the conclusion to which both the Master and the Judges of the Supreme Court of *Mauritius* have come in this case, viz.: that the representatives of *Auguste Peyras* and wife and other co-licitants, were within the principle of Art. 883 of the *Civil Code*, and consequently were not vendors but *copartageants*, having only the privilege which they were bound under Art. 2109 to inscribe within sixty days.

From this it necessarily follows that the privilege was lost by the omission to inscribe it within the time prescribed; that, to use the phrase of M. *Pont*, it has "degenerated" into an *hypothèque*, and the only remaining question is, whether the inscription of the

21st of April, 1860, was tantamount to an inscription of an *hypothèque* under Art. 2148, *Civil Code.*

In order to try this question, it may be well to re-state shortly the relative positions of the Appellants and the Respondent. After the sale by licitation the Appellants might have inscribed such debts as they could claim against M. *Courtaux* personally as charges upon the whole estate in his hands. They might also have inscribed such as they could claim against the estate of *Peyras* as charges upon what might be coming to that estate. They seem to have made directly no such inscriptions, certainly none before those of the creditors of *Courtaux* who are represented by the Respondent. Considered, then, as creditors of *Courtaux*, they have clearly lost their priority over the Respondent. They can only assert priority over him in respect of the fund in question by showing that the representatives of *Peyras* have duly inscribed a legal *hypothèque* upon it for their share of the proceeds of the first sale, to the benefit of which they, standing by subrogation in their debtor's shoes, are entitled.

The *ex officio* inscription of the 21st of April, 1860, would give notice to all who might search the Register of Inscriptions that the whole sale price remained unpaid, and remained in the hands of the purchaser. As mere notice to affect the consciences of persons about to advance money to *Nicolas Courtaux* this might have been sufficient; for they could hardly fail to infer that the particular share, for which each *copartageant* would have a privilege if he had duly inscribed it within sixty days, and for which he still had a right of *hypothèque*, was due to him.

The question, however, is not whether there was what a Court of Equity in this country would account notice; it is one of priority according to the provisions of positive law. If the law, in order to enforce the principle of publicity, has said that he who is first to inscribe his charge shall defeat, or obtain a preference over, a prior creditor of whose claim he may be aware, we cannot deprive him of the legal fruits of his greater diligence. That the French law is as above stated, seems to result from the letter of Arts. 2113 and 2114, *Civil Code;* and is positively laid down by M. *Troplong*, '*Traité des Priviléges et Hypothèque*,' *tom.* ii. p. 346, and other authorities. The only question, then, to be determined in such a

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case is, whether the prior creditor, in this instance the representatives of *Peyras*, has done that which, in law, is tantamount to a prior inscription.

The objections taken to the inscription of the 21st of April, 1860, as a valid inscription of the *hypothèque* of the heirs of *Peyras* are—

1st. That it was made not at the instance of the creditors, or of any person on their behalf, but by the Conservator of Mortgages, acting *ex officio* under the provisions of Art. 2108, *Civil Code*.

2nd. That it does not, either literally or substantially, satisfy the conditions of an inscription of an *hypothèque* under Art. 2148, or comply with the essential formalities required by that Article.

Upon the first point there is some conflict of authority. The case decided by the Court of *Poitiers*, on the 1st of July, 1831, 31 *Dalloz, partie* 2, p. 189, would, if it stood alone, be conclusive against the Appellants. In that case the deed of sale contained a special stipulation, whereby the purchaser gave to the vendors an *hypothèque* upon property other than that which was the subject of the sale; the Conservator, having transcribed the deed, thought it was his duty to inscribe both the privilege for the unpaid purchase-money and the conventional *hypothèque*. But the Court held that this inscription, though valid as to the privilege, was of no effect as to the *hypothèque*, which the creditor was bound to have inscribed at the instance of himself, or of some person on his behalf, under Art. 2148.

The Appellants, however, rely on the decision of the *Cour de Cassation* of the 13th of July, 1841 (41 *Dalloz, partie* 1, p. 295, and 41 *Sirey, partie* 1, p. 731), in the "*Affaire Chagot*," which, being the authority principally relied on by the Master, deserves particular attention.

In that case "*la famille Chagot*" sold to *Manley* and *Wilson* the *gérants* of a trading firm known as "*La Société Charenton*," ten thirty-second parts of certain factories for 1,000,000 francs. By a subsidiary arrangement the old company of *Charenton* was dissolved, and a new company formed under the same name, into which "*la famille Chagot*" brought as partners the remaining twenty-two thirty-second shares of the factories, receiving the

equivalent for these twenty-two thirty-two shares in the shape of shares in the new joint stock company of which *Manley, Wilson* and another became *gérants*. It was further specially provided that, in order to secure the payment of the 1,000,000 francs, the price of the ten thirty-second shares, the *Chagots* should have not merely the vendor's privilege on these shares, but an *hypothèque* on the entirety of the factories.

The Conservator having transcribed the deeds, inscribed *ex officio* both the privilege and the *hypothèque*.

The Report says expressly of this inscription: "*En même temps que le Conservateur prenoit une inscription d'office pour la conservation du privilége, il en prit une autre également d'office pour la conservation de l'hypothèque. Cette inscription avec élection de domicile chez l'avoué de la famille mentionnoit en outre de quel acte elle étoit prise, au profit de qui, et sur quels biens.*"

The company was unsuccessful, its property was seized and sold; and the rights of the parties in the proceeds of the sale became the subject of adjudication.

"*La famille Chagot*" appears to have claimed a vendor's privilege for the 1,000,000 francs upon the whole property; but failing that, a vendor's privilege upon ten thirty-second parts of the fund, and an "*hypothèque*" on the whole.

The Court of First Instance allowed the first claim, but this was set right, on appeal by the Court of *Dijon*, whose decision was afterwards affirmed by the *Cour de Cassation;* and it was finally held that the family had the privilege only in respect of the ten-thirty-scond parts, but a valid *hypothèque* on the whole property; and that the inscription of the latter, though made by the conservator *ex officio*, was good.

It is desirable to see what was the "*ratio decidendi.*" One of the "*considérants*" of the Court of *Dijon* is to this effect: "*Considérant que l'on voit que l'inscription critiquée est prise pour un droit d'hypothèque, &c. &c.; qu'ainsi cette inscription relatant non pas un privilége mais une hypothèque spéciale, et contenant suffisamment toutes les conditions de la loi, doit être déclarée valable.*"

The judgment of the *Cour de Cassation* has this statement: "*Attendu que l'inscription du* 25 *Septembre* 1826, *prise pour un*

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droit d'hypothèque avec élection de domicile non chez le conservateur, mais chez l'avoué des créanciers sur la totalité des immeubles de Creuzot avec désignation que ces immeubles ont été hypothéqués à la créance inscrite, a eu évidemment pour but de conserver dans l'intérêt de la famille Chagot l'hypothèque qui lui avait été constituée dans l'Acte du 11 *et* 12 *Juin* 1826, *pour súreté du paiement du million qui lui était dû par l'ancienne Société de Charenton.*"

Its reason for affirming the power of the Conservator to make the inscription was thus expressed: "Seeing that although Art. 2108 of the *Civil Code* makes it the duty of the Conservator to inscribe the privilege resulting from the transcription of the contract, the Code nowhere forbids him to inscribe, without having been required to do so, a conventional mortgage in the interest of another; and that Art. 2148 of the *Civil Code* admits that this may be done by any third person, and does not require him to have a mandate." It also proceeded in part on the ratification by the creditor.

It is obvious that if this decision is to be taken as overruling, or even of higher authority than that of the Court of *Poitiers*, it falls far short of what is required to support the Appellants' contention. In both cases the Conservator had avowedly and designedly inscribed a right of *hypothèque* as such. In the latter case he had made his intention more manifest by expressly conforming to one of the formalities prescribed by Art. 2148 of the *Civil Code*, viz., the election of domicile by the creditor.

In the case before us there is no pretence for saying that he intended to inscribe the *hypothèque* of the heirs of *Peyras* for the share of *Peyras*. He inscribed the supposed privilege of all the co-proprietors of the domain of *Riche Bois* as vendors for the whole sale price. It is not a question whether his *ex officio* inscription of an unquestioned *hypothèque* with all the essential formalities of registration is valid, but whether what he did with one purpose can avail for another; whether what he did *ex officio* for *A.*, *B.*, and *C.*, as vendors can operate as the inscription of *B.'s* right of *hypothèque* for his particular share.

Another case relied upon by the Appellants was that decided on the 4th of January, 1854, by the Court of *Agen*. This arose upon

a donation by an instrument, whereby the donor reserved for his own benefit certain charges on the property given. The Conservator, after transcribing the deed of gift, inscribed the charges. A question was raised whether the donor had the privilege of a vendor. It was decided that he had not; but that, inasmuch as the inscription complied with the substantial formalities of Art. 2148, it might avail as an inscription of those charges as *hypothèques*. It was held there that the election of domicile is not an essential formality. This decision is in direct conflict with that of the Court of *Nismes*, decided in the following November (*Nouvelle Sirey*, 1855, *partie* 2, p. 512). In that case the question also arose on a donation. There is, moreover, a manifest distinction between both these cases and the present, inasmuch as in both the person of the creditor and the amount of the charge were the same, whether the inscription were that of a vendor's privilege or merely of a right of *hypothèque*. The most that can be said of the former is that it follows that of the *Cour de Cassation*, which affirmed the power of the Conservator to act without a mandate.

M. *Pont*, in his *Traité des Priviléges et Hypothèques*, *tom.* i., sect. 270, p. 285, and again, *tom.* ii. sec. 933, p. 342, after commenting on the decisions which are in conflict with that of the Court of *Poitiers*, comes to the conclusion that if they are taken to establish that the Conservator of Mortgages, acting as a friend of the creditor and without mandate, may of his own mere motion inscribe an *hypothèque* in order to preserve the rights of that creditor, they may be supported; but that if they are to be taken to affirm that the Conservator of Mortgages has, *virtute officii*, the right to act *ex officio*, and inscribe *hypothèques* irrespectively of any requisition, the doctrine is one which ought to be rejected. In this state of the authorities, it can hardly be said that the power of the Conservator to inscribe a right of *hypothèque ex officio* is clearly established.

It is clear, however, that all the decisions in favour of his power assume that the inscription must satisfy the essential conditions of an inscription under Art. 2148; and this brings us to the consideration of the second point.

As to this, it must be admitted that the observance of some of

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the formalities prescribed by Art. 2148, is not essential to the validity of an inscription. It seems to be clear that the presentation to the Conservator of the two "*borderaux*," or notes specified in the article, is one of these, nor does it appear to be essential that the inscription should contain precisely all the particulars which the Article says are to be specified in those notes when presented. But on the question as to what may be safely omitted, there is a considerable conflict of authority. M. *Pont*, *tom.* ii. Art 956, says: "*La doctrine et la jurisprudence présentant là-dessus un pêle-mêle de décisions au milieu desquelles l'esprit le plus attentif chercherait en vain un système arrêté, ou une règle précise.*" M. *Troplong*, *tom.* iii. s. 669, p. 68, says: "*Quant à la jurisprudence, elle est pleine d'incertitudes.*"

M. *Troplong* considers that (sects. 665, 668, *bis*) the only three things which the inscription must express are the description of the immovable which is subject to the *hypothèque*, the person of the debtor, and the amount of the debt for which the *hypothèque* is claimed. He treats the description of the creditor, and the date of exigibility of the debt as non-essential; though there are certainly many cases, including one before the *Cour de Cassation*, in which the last was deemed essential.

M. *Pont* (*tom.* ii., sects. 962 *et seq.*, p. 363), appears generally to adopt the conclusions of M. *Troplong*; treating the description of the creditor as a very useful provision, but one made in the interest of him, rather than in that of subsequent creditors; and consequently, that its omission does not invalidate the inscription as against him. This modern doctrine of the commentators seems to be inconsistent with earlier decisions of the Courts, including the *Cour de Cassation*.

In the case decided at *Agen* on the 4th of January, 1854, being one of those principally relied upon by the Appellants, the Court, dealing with this question of essential and non-essential formalities, says: "*Attendu que les unes, comme le nom du débiteur, la désignation du chiffre de la somme, objet de l'hypothèque celle de l'immeuble grevé étaient tellement inhérentes à la substance de ce droit, constituaient en si haut degré pour les tiers intéressés comme pour l'inscrivant lui-même les éléments d'une manifestation indispensable, que*

leur omission devait frapper de nullité l'inscription qui la contiendraient, mais qu'à l'égard des autres formalités," &c., &c.

It is to be observed, however, that these questions touching essential and non-essential formalities have arisen in cases in which there has been an actual attempt on the part of a creditor, or of some person acting, or presumed to act, on his behalf, to inscribe his particular debt. Here the question is, whether an inscription made *alio intuitu* by a public officer can be taken to be a sufficient inscription by or on behalf of the creditor. In such a case it seems to be the more necessary that the inscription should shew on whose behalf the public officer was acting as *negotiorum gestor*. Accepting, however, the law as laid down by MM. *Troplong* and *Pont* and in the case last cited, to be applicable to this case, can it be said that the inscription of the 21st of April, 1860, expresses what it is essential that an inscription by the representatives of *Peyras* of their *hypothèque* should express? It, in fact, shews only that the whole purchase-money remained due from *Nicolas Courtaux* to those who might be found entitled to it, and claims for the whole class the privilege of vendors. The representatives of *Peyras*, if they had inscribed either under Art. 1809, or Art. 1848, could have claimed only a privilege or *hypothèque*, as the case might be, for their proportion of the purchase-money, and were bound to specify the amount for which they claimed an *hypothèque*, "*le montant de la créance.*" A third party who searched the register in order to know whether he could safely advance money to M. *Courtaux*, would learn only that all the co-licitants claimed a vendor's privilege for the whole sum, which, if he knew the law, he would know they could not effectually assert. It would not give him the assurance which the law requires that the representatives of *Peyras* claimed an *hypothèque* for a definite sum, part only of the purchase-money, which they had perfected by inscription.

Their Lordships have considered this question with reference to the 2148th Article. The case of *De Beaurepaire* (1) seems to assume that if the representatives of *Peyras* had duly inscribed their privilege as *co-partageants* under the 2109th Article, though

(1) Sirey, 1840, partie 2, p. 686.

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after the expiration of the sixty days, that inscription, if it complied with the substantial requisites of Art. 2148, would avail, as a sufficient inscription of an *hypothèque*. If such an inscription had been made in this case, it would probably have contained all the particulars of an inscription under Art. 2148 which are now deemed essential, and in particular "*le montant de la dette*." But no such inscription was made in fact. And it is to be observed that in respect of such an inscription the difficulty of presuming an authority in the Conservator to make it *ex officio* is greater than it is in respect of one made under Art. 2148. The words of the 2109th Article are, "*par l'inscription faite* à sa diligence;" the words of the 2148th Article are, "*soit par lui-même*, soit par un tiers;" and the decisions in favour of the Conservator's power to inscribe an *hypothèque* without a mandate proceed very much upon the latitude of the expression, "*soit par un tiers*."

Upon the whole, then, their Lordships, after anxiously considering the arguments of counsel and the authorities cited, have come to the conclusion that the judgment of the High Court of *Mauritius* in refusing to give to the inscription of the 21st of April, 1860, the character and effect of an inscription of the *hypothèque* to which the representatives of *Peyras* were entitled, cannot be successfully impeached. And they must, accordingly, advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Solicitors for the Appellants: Messrs. *Johnson, Upton, & Budd.*
Solicitors for the Respondent: Messrs. *Kynaston & Gasquet.*

THE VENERABLE WILLIAM JOHN PHILLPOTTS, CLERK, M.A. . . . . } APPELLANT;

AND

THE VERY REVEREND ARCHIBALD BOYD, D.D., AND OTHERS . . . . . } RESPONDENTS.

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Jan. 19, 20, 21, 22;
Feb. 25.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Jurisdiction of Bishop as Ordinary—Power of the Bishop of the Diocese over the Fabric of the Cathedral Church of Exeter—Reredos.

Upon a reredos erected for purpose of decoration in *Exeter Cathedral* by the Dean and Chapter of *Exeter* were sculptured representations in high relief of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the Day of Pentecost, with figures of the Apostles delineated as forming part of the connected representation of the historical subject. On each side of the reredos, as finials to its architectural form, was a separate figure of an angel.

The Bishop of *Exeter*, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed:—

Held (by the Privy Council, reversing the decree of the Court of Arches), that although the bishop, as ordinary, in the exercise of his visitatorial power over the cathedral church of *Exeter*, cannot at his discretion order any alteration in its fabric, it was within his jurisdiction to find that the sculpture had been unlawfully erected, and on that definite legal ground to order its removal:

Held, also, that the structure was not illegal, and that so much of the decree of the Court of Arches as reversed the order of the bishop directing its removal must be affirmed.

THIS was an appeal from a decree of the official principal of the Arches Court of *Canterbury* (Aug. 6, 1874) in the matter of an appeal against a decision (April 15, 1874) of the Bishop of *Exeter* pronounced at a visitation of the cathedral church of *Exeter*. For a report of the proceedings at the said visitation and in the Court of Arches, the reader is referred to Law Rep. 4 A. & E. p. 297. The questions raised in this appeal were, first, whether the bishop had such jurisdiction as was exercised in this case; secondly, whether his license or consent was necessary before the dean and chapter

* *Present*:—LORD HATHERLEY, LORD PENZANCE, LORD SELBORNE, THE LORD CHIEF BARON KELLY, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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of the cathedral church of *Exeter* could make any substantial alteration in its fabric; thirdly, whether the reredos and the images thereon were illegal.

Mr. *W. F. Phillpotts* and Mr. *B. Shaw*, for the Appellant.

Dr. *Deane*, Q.C., and Mr. *W. G. Phillimore*, for the Respondents.

Mr. *W. F. Phillpotts*:—

First, as to the jurisdiction of the bishop. It exists *jure ordinario* over the fabric of the cathedral. It was claimed on the other side that the cathedral was the peculiar of the dean and chapter, and that the bishop, though visitor of dean and chapter, was only so under statutes. The distinction between lay and spiritual corporations has for 300 years been absolutely settled law. In the former the founder can do as he pleases, and the visitor has the powers assigned to him, and no more. Spiritual corporations, which include all incumbents, &c., are visitable by the ordinary, who has different powers from those which he would possess in visiting a college or hospital. It is impossible that a bishop can be visitor of any place and that at the same time that place should be the peculiar of some other authority: see *Parham* v. *Templar* (1); *Johnson* v. *Ley* (2). He referred to the First Report of the Cathedral Commissioners, 1852, to the answers of the Dean and Chapter of *Exeter* at p. 183 as to the constitution of the chapter, p. 193 as to the bishop's jurisdiction as visitor, and as to the relation of the chapter to the bishop of the diocese. See also the form of mandate used on visitation of the cathedral as appeared at the visitation by Bishop *Lamplough*, in 1678. The dean, it appears, had archidiaconal jurisdiction in the close subject to the bishop. Here the dean and chapter is a corporation, and a question is raised by a member of it; and it is impossible to say that that is not subject to the jurisdiction of the visitor.

The sanction of the bishop to any alteration by the dean and chapter in the fabric of the cathedral is as necessary as it is in the like case of a churchwarden effecting an alteration in the fabric of his church. For an instance of such consent being given he

(1) 3 Phillim. 223. (2) Skinner's Rep. 589.

referred to the records of the cathedral, 25th August, 1638, on the occasion of certain repairs by Archdeacon *Helyar*. Throughout the history of the cathedral all the repairs and alterations were done by the authority of the bishop. There is no power to add to or to destroy any part of the fabric without the consent of the bishop; it is another matter whether a faculty is necessary. The cathedral is a parish church in the ordinary sense of the word, and the consent of the ordinary is necessary to any alteration in the fabric: see *Westerton* v. *Liddell* (1).

As to the illegality of the reredos and its images: by the judgment of Sir *H. Keating* (2) it is established, first, that images of Christ in churches were prohibited by a proclamation of 1548, which declared the law of the Reformed Church, and was recognised as valid in the next year by 3 & 4 Edw. 6, c. 10; secondly, that the statute 3 & 4 Edw. 6, c. 10, to the effect that images in churches are illegal, is now in force. For recognition thereof by the Privy Council, see *Westerton* v. *Liddell* (3). The Homilies, moreover, which are set forth by authority, condemn in the strongest terms images of Christ over a communion table. The judgment appealed from has gone behind the Reformation, and has attempted to revive the law as to images as it stood in the reign of *Henry* VIII. and *Edward* VI., when "use" of images in worship was permitted, and the worship or abuse of images alone prohibited.

The reformation in respect to images was gradual. The Injunctions of 1547 (*Card.* [Ed. 1844], Doc. Ann. vol. i., p. 6), art. 3, while they order abused images to be taken away, declare that the parishioners are to be taught that other images in churches are to serve as a remembrance whereby "men may be admonished of the holy lives and conversation of them that the same images do represent." But these Injunctions cannot be taken to shew the law of a Reformed Church, for at the date when they were issued the Church was in doctrine Romish, the *Statute of Six Articles* was unrepealed (3 Hen. 8, c. 14; 35 Hen. 8, c. 5), which enforced, under capital penalties: 1. Transubstantiation; 2. Communion in one kind; 3. Celibacy of the clergy; 4. Vows of chastity; 5. Private masses; 6. Auricular confession to be frequented.

(1) Moore's Special Rep. p. 14. (2) Law Rep. 4 A. & E. 304.
(3) Moore's Special Rep. pp. 160–174.

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The *Statute of Six Articles*, and all other statutes concerning religion, were repealed in November, 1548, nine months after the issue of these Injunctions (stat 1 Edw. 6, c. 12), and on the 24th of February following a proclamation or mandatum was issued (*Card.* Doc. Ann. vol. i., p. 47), by which all images were ordered to be removed, and special condemnation declared of images of Christ.

The Mandatum of 1548, on the other hand, is the first enactment or declaration of law as to images after the law of the Reformed Church had become settled, it declares illegal the "dead images" inside churches, "which be things not necessary, and without which the churches of Christ continued most godly many years." It is on this that we especially rely.

The judgment appealed from denies the validity of this proclamation (1). It is clear that it was recognised as valid by the statute of 3 & 4 Edw. 6, c. 10. It is also clear that it was acted upon: see *Cranmer's* Visitation Articles of 1548 (*Card.* Doc. Ann. No. X.) in which he inquires whether "*all*" images have been destroyed; while the corresponding Visitation Article, issued in the previous year, upon the Injunctions of 1547, limits the inquiry to "*misused*" images. As to 3 & 4 Edw. 6, c. 10—sect. 6, by excepting images "set or graven" on tombs, shews that figures in relief, as well as single statues, were included in the prohibition. The statute was originally framed to apply to the Popish books only, and the including images in it was an afterthought. Accordingly, in the penal section, the penalty is not extended to images, but the earlier words of the section include them. The title is, "An Act for abolishing divers Books and *Images*," and the exception in the 6th section shews that the Legislature considered that all images were prohibited by the previous clauses. It is erroneous to say that the Act had only a temporary purpose or effect. It prohibits, no doubt, the possession of Popish books; but that is impliedly repealed by the Toleration Acts. The preamble shews that the duration of the Act was not limited. It says that the books "shall be by authority of this present Act clearly and utterly abolished, extinguished, and forbidden '*for ever*' to be used or kept within this realm." The subsequent legislation also

(1) Law Rep. 4 A. & E. 359.

shews that the Act was never regarded as having merely a temporary effect. It was repealed by *Mary* (1 Mar. st. 2, c. 2); it was revived by *James* I. (1 Jac. 1, c. 25, s. 48), and it was referred to as existing law in respect of images in *Sherfield's Case* by *Richardson*, C.J. (1), and by *Laud* in his own trial (2). And when, in 1863, the reviving statute of *James* I. was repealed, this statute of *Edward* VI. was excepted from the repeal, and still remains law in the statute book. See on this point *Westerton* v. *Liddell* (3), where it was held, in reference to the Injunctions of 1547, and the Proclamation of 1548, "after the most anxious consideration," that the word "images" in these laws only applied to figures of persons, and therefore, while a cross was then held not illegal, it was at the same time laid down that a crucifix, *i.e.*, a cross plus an image, was illegal.

The judicial acts of the bishops, in the reign of *Edward* VI. subsequent to the statute, shew that it was treated as clear law that all images were prohibited. Bishop *Ridley*, in his Visitation Articles to the diocese of *London* in 1550 (*Card.* Doc. Ann. No. XXI., [Ed. 1846], p. 98), inquires "whether there be any images in your church?" So Bishop *Hooper*, in his visitation of *Gloucester*, A.D. 1551, inquires, art. 4, "whether all imagery be clean taken out of the church." This is the best *contemporanea expositio* of what the law was. There is no exception in them of any image put up since the Proclamation of 1548, or the Act of 3 & 4 Edw. 6, c. 10, yet, according to the Dean of Arches, such new images were legal. There is another document, issued in 1549, by *Cranmer*, to which we must refer, not only as a *contemporanea expositio* of what was done under the proclamation of 1548, but also to shew that the Dean of Arches has gone behind the Reformation, and taken the law as it stood in Romish times. He quotes in his judgment (4), the opinion expressed by Archbishop *Cranmer* in 1536 and 1537, when the use of images in religion was recognised. The answer of *Cranmer* to the *Devon* rebels, in 1549, clearly shews that his views of the law and practice of the Church at that date, when the Reformation was settled, were entirely

(1) State Trials, vol. iii. col. 543.
(2) State Trials, vol. iv. col. 455.
(3) Moore's Special Rep.
(4) Law Rep. 4 A & E. p. 354.

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changed: see *Cranmer's* Remains, *Parker* Society, p. 179. [LORD SELBORNE:—This cannot be received as evidence. I cannot see why it should be the practice to receive in these ecclesiastical cases documents as evidence which would not be admitted in other cases.] This document is tendered on three grounds:—1. In answer to part of the judgment appealed from, which relies on *Cranmer's* opinion expressed at a previous date. 2. As a *contemporanea expositio* of what was done under the laws just quoted; and 3. Principally as an historical document, shewing facts of public interest, and in order to put before the Court the historical facts, a knowledge of which is necessary to understand the subsequent legislation; and this is legitimate, in the same way as in construing a will it is allowable to put the Court in possession of the facts with reference to which the testator made his will. [THEIR LORDSHIPS consulted, and LORD HATHERLEY intimated that the Court could not admit the document.]

Passing to the reign of *Mary*—— [LORD SELBORNE:—We have nothing to do with her reign; the statute of *Edward* VI., on which you rely, was not then in force.]

The fact with reference to which the subsequent laws were made was a controversy between the Roman Catholics and Reformers as to images. The Roman Catholics condemned the worship of images, but they insisted on the use of them in churches as "laymen's books." The Reformers condemned this use, and the presence of images in churches at all. It is impossible to understand the legislation unless we are permitted to shew the facts to which it referred. [LORD PENZANCE:—You may take it generally that there was a controversy about images, but it is a different thing to claim to go into the details of the controversy. When you quote any ambiguous laws it may be that you may go into the former history to explain the facts to which they refer.] In 1559 Queen *Elizabeth* issued Injunctions which expressly ordered the removal of all "monuments of idolatry and superstition." The terms are ambiguous; in order to shew that images were condemned under these terms we must look both at what was done under them by the Protestants of *Elizabeth's* reign, and what were the practices in *Mary's* reign at which they were aimed.

In the first place, the Injunctions were framed for a Royal Visitation, and the 2nd article of inquiry administered at the visitation inquired whether "all images" had been taken away: *Card.* Doc. Ann. [Ed. 1844], p. 242, No. XLIV., being in precisely the same terms as the article of inquiry at *Cranmer's* visitation in 1548, after the proclamation of *Edward* VI. The Visitation Articles and injunctions must be read together as one document, and then it is clear that images were included in the term "monuments of idolatry."

In 1560 a proclamation was issued by *Elizabeth* (*Card.* Doc. Ann. p. 289. No. LIV.), to restrain those who had gone beyond the law. and this, while it declares that images on tombs and in painted windows are not to be removed, clearly recognises that all other images in churches were illegal. It is important also as shewing that figures in painted windows were treated as different from images. In 1562 the Second Book of Homilies was issued by Convocation, containing three Homilies expressly declaring that all images in churches were contrary to Scripture and law, and particularly condemning images of Christ placed over the Communion Table. The subsequent visitation articles shew that images were considered clearly illegal. It will be sufficient to refer to two—one for each province. Archbishop *Parker* for the Province of *Canterbury*, 1569: *Card.* Doc. Ann. [Ed. 1844], p. 357, No. LXXIII. Art. 6. Archbishop *Grindall*, for the Province of *York*, in 1576: *Card.* Doc. Ann. [Ed. 1844], No. LXXXII. p. 398, Art. 4. Numerous other articles of inquiry to the same effect up to the end of *Elizabeth's* reign are to be found in the Appendix to the second report of the Ritual Commissioners.

There is another kind of evidence which has been relied upon in these cases (1).

The English Church was steering a middle course between the Puritans and the Roman Catholics. That it removed all images of every kind, historical subjects or otherwise, is shewn both by the positive evidence of the Roman Catholics' complaint of their removal, and the negative evidence that images are never men-

(1) See Lord *Hatherley's* judgment in *Hebbert* v. *Purchas* (Law Rep. 3 P. C. 643).

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tioned among all the Puritans' minute complaints, that include lists descending to the veriest trifles. [THEIR LORDSHIPS refused to admit the evidence of such complaints or the answers to them.] The Homilies and Injunctions are sufficient evidence of what was done by Protestants under the laws in *Elizabeth's* reign. The "monuments of superstition," against which *Elizabeth's* laws were directed, were the images which had been restored by *Mary:* see Articles of Visitation in the diocese of *London,* by Bishop *Bonner,* A.D. 1554; *Card.* Doc. Ann. No. XXXIII. [Ed. 1844], p. 152; and an extract from "A Mandate of *Bonner,* Bishop of *London,* to abolish the scriptures and writings painted upon the church wall, A.D. 1554": *Card.* Doc. Ann. No. XXXIV. [Ed. 1844], p. 168; and see Article X. set forth by Cardinal *Pole* in his ordinary visitation of his Diocese of *Canterbury,* A.D. 1557: *Card.* Doc. Ann. No. XLI. [Ed. 1844], p. 206. Whatever the effect of *Elizabeth's* Injunctions, it is quite clear that since 1562, when the Second Book of Homilies was compiled by Convocation, and issued by royal authority, images were illegal. As to the authority of the Homilies, it has been recognised by canons, statutes, and judicial decision. They have been decided to be standards of doctrine by Dr. *Lushington* in the case of *Bishop of Salisbury* v. *Williams* (1). See also *Voysey* v. *Noble* (2). [He also referred to Queen *Elizabeth's* Injunctions (1559), *Card.* Doc. Ann. vol. i., p. 224, Injunction No. 27; to the 35th of the Articles of 1562, passed in Convocation and confirmed by the royal authority; to Queen *Elizabeth's* Advertisements (1564), *Card.* Doc. Ann. vol. i. p. 325; and to the 46th and 49th of the Canons of 1603; and to the 35th Article in our present Prayer Book.] The burden of the Homily is that the consequence of the Church's following the advice of Pope *Gregory* in his letter to *Serenus,* referred to by the Dean of Arches, and retaining images in churches, was, "that the whole Christian world was plunged in the pit of the most damnable idolatry for the space of eight hundred years."

It is a fallacy to suppose that the controversy between the Roman Catholics and the Protestants was a controversy about the worship of images in the modern sense of the word "worship."

(1) 1 N. R. 199. (2) Law Rep. 3 P. C. 363, 364, 383.

The Roman Catholics in theory forbad the worship, "*cultus*," as strongly as we do. All they argued for was the use of images, in the words of *Gregory's* letter, as "laymen's books" for instruction or memory. No doubt in practice the Roman Catholic theory degenerated into superstitious reverence, but this is just what the English Church in the Homily says must be the result of that theory as a deduction from the laws of human nature proved by experience; and we, after a further experience of three hundred years, can say that the truth of this theory is still shewn by the practice of the Roman and Greek Churches. In fact, the theory of the Dean of Arches—as shewn in his quotations from the articles of *Henry* VIII.'s reign, his references to "a language addressed to the eye," to "the innocent aid ministered to religion by the arts of painting and sculpture," and his quotations from *Tenison* and *Wake*—is not in principle distinguishable from that of the Church of *Rome* in the article from the Council of *Trent* which he quotes in his judgment, or the explanation of that article in the authorized edition of the Catechism of the Council of *Trent:* see *Donovan's* Catechism of the Council of *Trent, Rome* Propaganda Press, *Superiorum Permissu* [Ed. 1839].

At least, it will be admitted that the Church of *England* suffered no *use* whatever of images in religion. To support the contention of the dean and canons the images must be mere architectural decorations, and nothing more. If the stock or stone be in any way honoured, it is illegal; we maintain that whether it be desirable or not to use an image of the Lord merely to decorate a wall, according to the theory of the Church if so placed it must be used in religion. The Homily specially forbids the image of Christ when, as here, it is placed where the solemn service of the Communion is performed. Such a use of an image as an aid to worship is within the prohibition of the article, for "worship" in the sixteenth century meant any outward religious honour, any use in religion. The proper interpretation of the Injunctions and Statute of *Edward* VI. is that adopted by the assessor to the Bishop of *Exeter*, and that, apart from their express prohibition of images in churches, by the common law of the Church of *England* images in churches are illegal.

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The cases of *Faulkner* v. *Litchfield* (1), *Westerton* v. *Liddell* (2), *Parker* v. *Leach* (3), establish that it was a principle of the Reformers to prevent anything being fixed at the place where the altar stood which could mark that spot as peculiarly holy. On this principle it is settled that the table shall be really moveable, and though it is not in practice moved, nothing is to be done in respect of it which is inconsistent with its being moveable. On this ground it was decided that it must not be of stone, because that would shew that there was no possibility of moving it, *i. e.*, that the principle was abandoned.

A reredos such as this, so constructed as to be wholly inconsistent with moving the table, must fall under the same condemnation.

Further, by the Advertisements of *Elizabeth*, which have been recognised as binding law in *Hebbert* v. *Purchas* (4), it has been settled that the table of the Commandments is to be placed where the communion table usually stands. The Respondents have removed this illegally, and substituted for it the present reredos, and have left no place for the Commandments, and on this ground alone, if on none other, the judgment of the Bishop of *Exeter* must be affirmed.

Mr. *Benjamin Shaw*, on the same side:—

The Injunctions of *Edward* VI. were not issued under the *Proclamation Act*, 31 Hen. 8, c. 8, and their validity was, therefore, not affected by its repeal by 1 Edw. 6, c. 12. They were issued under the *Supremacy Act*. They do not refer to the *Proclamation Act*, and the penalties by which they are to be enforced are not, then, in the *Proclamation Act*, but are ecclesiastical only. In 1550, when proceedings were taken against *Gardiner*, the articles exhibited against him rest the force of the injunctions on the supremacy alone, and *Gardiner* gives an affirmative answer to the article: see *Foxe*, vol. vi. p. 64 [*Cattley's* ed.] They were, therefore, deemed to be in full force, notwithstanding that the *Proclamation Act* had then been repealed. They were, therefore, a recognised and valid

(1) 1 Rob. 251.
(2) Moore's Special Rep.
(3) Law Rep. 1 P. C. 326.
(4) Law Rep. 3 P. C. 605.

means by which the royal supremacy was exercised. The same may be said of the letter, or *mandatum*, addressed to *Cranmer* (*Card.* Doc. Ann. vol. i. p. 47), for the removal of images. The issuing of such mandates is recognised and provided for in the proclamation which precedes in *Card.* p. 42. Such mandates were very common: see *Cranmer's* Letters and Remains (*Park.* Soc.), pp. 490, 493, 494, 495, 530, and *Card.* Doc. Ann. vol. i. pp. 33, 63, 72, 76).

It is not improbable that they were considered as "orders" made under the 26 Hen. 8, c. 1; for that Act does not prescribe any particular form of order. It must be remembered that there were then no Acts of Uniformity. Originally every bishop ordered and controlled matters of Divine worship in his own diocese. The Crown, as supreme ordinary, seems to have claimed a paramount right to do so. In *Foxe*, vol. vi. p. 64, the Crown claims the right to make laws and ordinances, and it is admitted by *Gardiner*.

At all events, this *mandatum* received legislative confirmation by the 3 & 4 Edw. 6, c. 10.

Again: the object of the law is well expressed in the title of the Homily. It is to prevent not merely "idolatry," but "peril of idolatry." The object is to remove what is capable of abuse, not merely what has been abused. This is the only effectual course. A layman could not be punished by the Ecclesiastical Courts for undue reverence to an image in a church. Hence the only safety is in preventing the risk.

It is said that the Homilies treat Apocrypha as Scripture, and contain other errors. But this does not detract from their general authority, but applies only to special passages. If they had not a general authority, they would not be recognised in the Thirty-nine Articles. It is the general aim and tenor of the Homily that is now relied on, not merely an isolated passage. The distinction is well put in *Cosin's* Letters on the Canon (*Cosin's* Works, Anglo-Cath. Lib. vol. iv. p. 444). After stating some expressions in the Homilies which are not authoritative, he concludes: "And yet, notwithstanding these words, we are all bound to subscribe to the general aim and doctrine of those Homilies, wherein they are found, that it was and is behoveful for the times."

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Again: the Court, it is submitted, will consider not only whether this reredos is legal or illegal, but will exercise a discretion as to sanctioning it. If it be the case that the dean and chapter were not bound to apply for a faculty, it is submitted that the Court must on this appeal have a right to exercise the same discretion as if it were an application for a faculty. Otherwise, no means exist of trying the question of expediency (which is always entertained in a faculty case) in the case of a cathedral. It might be deformed therefore by most objectionable alterations without the power of appeal, if only they were not absolutely illegal. And this reredos is inexpedient and improper. The principle to be extracted from *Faulkner* v. *Litchfield* (1), *Westerton* v. *Liddell* (2), and other like cases, seems to be that, though the communion table is not moved in practice, yet that in point of theory nothing must be done to contravene the principle of its mobility. Thus, it must not be fixed, but must be a moveable table. Now the construction of an elaborate reredos with images of this kind on it, implies that the table is constantly to stand under it. The sculptures are in honour of the table, and of the rite which takes place at it, and conveys the impression that at the time of that rite the table will always and necessarily stand there. Otherwise an unseemly gap would be left, and the whole structure would be without meaning. This is in contravention of the principle that the table must be moveable, and of the reasons assigned as the foundation of that principle. It is a parallel case to that of a baldacchino. In *White* v. *Bowron* (3), in refusing a faculty for a baldacchino, the Court said that, "If the holy table were removed from underneath it, the baldacchino would be then without meaning." The same observation applies in this case. It is, therefore, at variance with the theory of a moveable communion table, and ought not to receive the sanction of the Court.

Dr. *Deane*, Q.C., for the Respondents:—

[LORD HATHERLEY intimated that their Lordships desired to hear the Respondents upon the subject of the legality of the reredos. They did not require argument as to the alleged necessity

(1) 1 Rob. 251. (2) Moore's Special Rep.
(3) Law Rep. 4 Ad. & E. 207.

for a faculty previous to its erection, and they left it to the discretion of the Respondent's counsel whether they wished to say anything upon the subject of the bishop's jurisdiction.]

First, as to the jurisdiction of the bishop. A long unbroken and reasonable custom shews that the bishop *quâ* bishop *quâ* ordinary has no control over the fabric of the church. The Visitations of 1675 and 1688 are relied upon on the other side, and are the sole authorities in favour of the authority claimed. But the best evidence of the right to exercise jurisdiction is the fact of exercise, the best evidence of the fact is the record,—the production of the faculty, which would be found in the bishop's register. It is said that there is no alteration of sufficient magnitude to require a faculty. But removals in this century were effected by the dean and chapter.

In a parish church, if churchwardens presented that there was a reredos, the archdeacon could only report to the bishop, who could take proceedings, and then there would be a requisition to shew cause. [LORD SELBORNE:—*Primâ facie* a bishop can visit as ordinary and correct everything that is contrary to law; you must shew that the fabric is excepted from his jurisdiction.] They do not shew any exercise of jurisdiction in regard to the fabric. [LORD SELBORNE:—Yes they do; recently there may not have been any occasion for it.] The course for the bishop to take would be to report to the archbishop. [LORD SELBORNE:—Will you produce an authority to shew that such report would be necessary, and that he could not act himself? SIR MONTAGUE E. SMITH:—If the bishop as visitor can make an order as to the statues, why may he not also as to the fabric?]. See *Dean of York's Case* (1). [LORD SELBORNE:—That would be in point if the bishop had deprived the dean and canons for contumacy.] Here the bishop was constantly present in the cathedral from 1871, when this structure was being erected, and made no objection to it.

With regard to the illegality of the reredos. It is urged on the other side that all images and paintings, wheresoever placed, provided they are monuments and not representations of persons deceased, are illegal. We are all agreed that images misused or

(1) 2 Q. B. 1.

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abused are to be extinguished. Passing by the mediæval learning resorted to on the other side, attention is confined to the statutes, the mandate, and the decisions of this Court. As to the mandate, and the evidence of its ever having been issued, in the archives at *Lambeth* is found a Latin letter in which is a copy of a certain order made by the Council to the archbishop. That is all which is known of the document, and no one has attached validity to it. But Lord *Kingsdown*, in *Westerton* v. *Liddell* (1), called it a proclamation. It relates to "all images;" but its meaning must have been limited, otherwise 3 & 4 Edw. 6, c. 10, would have been unnecessary. As to the statute under which the mandate is supposed to derive authority, the true construction of 26 Hen. 8, c. 1, is not to give arbitrary power, but to supersede the Pope, and put the king in his place, subject to the laws of the land. No power to give binding force to this *mandatum* was conferred by the *Supremacy Act*. He referred to the Articles of Enquiry, 1547; *Card.* Doc. Ann. vol. i. which relates to "all images of feigned miracles, idolatry, and superstition." As to 3 & 4 Edw. 6, c. 10, it was no doubt repealed by 1 Mary, st. 2, c. 2, together with a number of other Acts from 1 Edw. 6 to 5 & 6 Edw. 6, c. 12. Th Act of *Mary* was, in its turn repealed by 1 Jac. 1, c. 25, s. 48, which is included in the schedule of the repealing Act, 26 & 27 Vict. c. 125, without prejudice, however, to the Statute of 3 & 4 Edw. 6, c. 10, which had been revived, and which stands now as if it had never been repealed. Whatever the *contemporanea expositio* of this Act, the persons who executed it conceived that crosses were images, for they destroyed crosses. [He referred also to *Card.* Doc. Ann. vol. i. No. LIV. the Queen's Proclamation against defacers of monuments in churches, 1560.]

Thus the Legislature and the Queen, acting with at least as much power as *Edward* VI. said that those who legislated and those who executed the orders had charge only to deface not all images, but "monuments of idolatry and feigned miracles in churches and chapels,"—a species of *contemporanea expositio* superior to anything to be found in letters or memorials by private persons.

[He referred also to 8 & 9 Vict. c. 44, s. 1.]

(1) Moore's Special Rep.

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The Homilies referred to were written to denounce the causes of idolatry, but they draw no distinction between one class of images and another. The real distinction is as to images which are plainly "monuments of idolatry," while the use of this reredos is purely for ornament.

Mr. *W. G. Phillimore,* on the same side:—

Suppose this reredos was unlawful, the bishop had no power to pronounce as to its illegality or to order its removal. No precedent was produced on the other side of the exercise of such power. There is no instance in modern times of such a visitation in any contentious proceeding: see *Dean of York's Case* (1). He referred to *Phillimore's* Eccl. Law, p. 1210, and the case of the *Cathedral of St. Colombo, Derry,* cited therein, p. 1799. The dean has a peculiar exempt from the jurisdiction of the bishop and his officers: *Johnson* v. *Ley* (2); *Parham* v. *Templar* (3). See a record produced dated the 12th of March, 1828, shewing that in 1827 a person was tried in the Dean's Court for quarrelling in the cathedral. He also referred to *Ayliffe's Parergon,* pp. 417, 418, and *Philips* v. *Bury* (4).

Mr. *Phillpotts* replied.

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The judgment of their Lordships was delivered by

LORD HATHERLEY:—

This is an appeal from a decree of the Court of Arches, reversing an order made by the Lord Bishop of *Exeter,* as visitor of the cathedral church of *St. Peter,* in *Exeter,* for the removal of a sculptured reredos recently erected at the east end of the choir of that cathedral by the dean and chapter, on the ground that the sculpture, so erected, contains or consists of images, not permitted within churches by the law of the Church of *England.*

The judgment of the Court below makes it necessary, in the first place, to decide whether the bishop, as ordinary, had a visitatorial power over the cathedral Church of *Exeter,* with reference to the sculpture of which the Appellant complained, and whether, in the exercise of that power, it was competent for him, if he found

(1) 2 Q. B. 1, and p. 40.
(2) Skin. Rep.
(3) 3 Phillim. 223.
(4) 2 T. R. 353.

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that sculpture to have been unlawfully erected, to make an order for its removal.

The Respondents have contended throughout these proceedings that the bishop had no such power, and the learned Judge of the Court of Arches has so determined.

It is not, and indeed it could not be, disputed that, according to the General Ecclesiastical Law, "all deans and chapters are subject to the visitation of the bishop, *jure ordinario*, and of the archbishop of the province, *jure metropolitico*" (*Burn's* Eccl. Law, [*Phillimore's* Ed. 1842], vol. ii. p. 93). It is equally certain that as to some matters, at all events, the bishop, visiting his dean and chapter as ordinary, would have power to make orders binding upon the dean and chapter, subject to an appeal to the higher Ecclesiastical Tribunals. By the case of Dr. *Goodman*, reported in *Dyer*, p. 273 (the same law is recognised by Lord *Holt* in *Philips* v. *Bury* (1), it appears that, before the *Church Discipline Act*, 3 & 4 Vict. c. 86, this power would have enabled a bishop, as visitor, to pronounce in case of necessity a sentence of deprivation against an offending member of the chapter. Since that statute it has been determined, in the *Dean of York's Case* (2), that in order to inflict any personal punishment for an ecclesiastical offence upon an individual member of a chapter, the bishop must proceed against him as against any other clerk in holy orders, under the *Church Discipline Act*, and not as visitor. But the statute leaves untouched all other power which the bishop might previously have exercised in his visitation except this single power of proceeding against individuals by way of punishment.

Two arguments have been urged before their Lordships in this case against the bishop's jurisdiction.

The first is that, although the bishop may have power to visit the dean and chapter as ordinary, and also power, in some cases, to make orders binding on the dean and chapter (subject to appeal), yet he cannot do so with reference to any part of the structure or fabric of the cathedral church. For such a limitation of the bishop's visitatorial power no authority has been cited; and, considering the nature and importance of the duties which the dean and chapter have to perform with respect to the fabric of their church,

(1) 2 T. R. 353. (2) 2 Q. B. 1.

the burden of proof rests, in their Lordships' opinion, on those who, admitting the general visitatorial power, contend that it is thus limited. It appears, not only from the precedents in the history of the cathedral church of *Exeter*, to which their Lordships will have occasion to refer, but from the form of the articles of inquiry at the visitation of the cathedral church of *York* by Archbishop *Harcourt, jure ordinario*, in 1841 (which the learned editor of *Burn's* Eccl. Law [Ed. 1842], vol. ii, p. 93, states to have been "framed in careful compliance with former precedents"), that the practice, in visitations of this kind, has been for the ordinary to include, among the matters cognizable by him in this form of proceeding, the repairs and generally the state and condition of the fabric of the cathedral church. The reason of the thing and all the authority which has been produced is opposed to this first argument, which their Lordships therefore reject as untenable.

The other argument (and it is that which seems to have chiefly prevailed with the learned Dean of the Arches) is, that the Dean of *Exeter* has a peculiar jurisdiction exclusive of the bishop within the "close" of the cathedral church, which (it is contended) includes the area and fabric of the cathedral itself. Reliance, for this purpose, was placed upon an instrument of "composition," dated in 1616, and purporting to be made between the then Bishop of *Exeter*, the dean and chapter, the dean, the several archdeacons of the diocese, and the custos and college of vicars choral of the cathedral church. Their Lordships were referred to what purports to be a copy of this document, printed in a note at pp. 232–236, of vol. iii. of Dr. *Phillimore's* Reports. It is hardly necessary to say that such a printed statement in a book of reports could not be treated by their Lordships as in itself evidence, either of the existence or the due execution of such a document. The fact of its execution seems to have been challenged in the reported case. Their Lordships, however, understood the argument in the Court below, and upon appeal, as having proceeded upon the footing of the execution and authority of such a document, and they therefore proceed to consider its value and effect. It was not alleged that the successors of the then Bishop of *Exeter* could, by the mere force of an agreement or composition of this nature, made in 1616, be ousted from any ordinary jurisdiction which they would other-

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wise have possessed; but the contention was, that this document is evidence of the previous legal existence of a peculiar of the dean within the "close" of *Exeter*, exclusive of the ordinary jurisdiction of the bishop. Some of the remarks made by Sir *John Nicholl*, in his judgment in *Parham* v. *Templar* (1), seem for this purpose to be important. This document, he says, "states that the agreement or composition is made upon a view of ancient usage, and upon searching and consulting proper authorities. But it does not state how far any such search was made, nor recite any particulars to prove this ancient usage. In short, whether it may not be altogether irregular and an usurpation, the instrument itself does not afford any means of ascertaining. The search was probably made, not by the archdeacons or the bishop, or any of the principals, but by their agents or officers,—possibly some practitioners in these Courts not very well read either in the Canon or the Civil Law of the country." Upon these grounds, and on the further ground of the metropolitan not being a party to the instrument, the learned Judge, in that case, refused to accept it as evidence that an appeal from those peculiars of the dean and chapter (such as *Ashburton*), which were exclusive of the bishop's ordinary jurisdiction, would lie to the bishop in the first instance, and not to the metropolitan. Yet this seems to have been an inseparable part of the composition, considered as (what it purports to be) a general scheme for defining the manner and form in which the execution of the ecclesiastical jurisdiction of the several parties to it should for the future "be bounded, limited, and for ever thereafter used and exercised by the said parties and their successors;" and for the "clearing" of those "questions" which it recites to have been "then, and theretofore, moved between the same parties, touching the execution of ecclesiastical jurisdiction within the diocese of *Exeter*;" "and for the settling and establishing a peace and certainty therein for ever thereafter between the said parties and their successors." The Court does not appear to have proceeded in the case of *Parham* v. *Templar* (1), upon the sole evidence of this document, so far as it recognised *Ashburton* as being a peculiar of the dean and chapter, in which their jurisdiction was exclusive of the ordinary jurisdiction of the bishop; and in that case no ques-

(1) 3 Phillim. 252.

tion whatever arose as to any jurisdiction either of the dean or of the bishop within the cathedral close or the cathedral itself.

Supposing, however, that this composition could properly be accepted as evidence of some exclusive peculiar jurisdiction of the dean within the cathedral close, its terms must be accurately weighed to ascertain the true nature and character of that jurisdiction. The material parts of the composition are these:—

1. "That *Matthew Sutcliffe*, dean of the said cathedral church, and his successors, and his and their officer and officers, shall forever hereafter, solely and without any concurrence, prove in common form all testaments" (except those of knights, beneficed men, and such as were *de robâ Episcopii*) "within the parish of *Braunton*, in the county of *Devon*, and the close of the cathedral church of *St. Peter*, in *Exeter;* and also, solely and without any concurrence, hear and determine, within the said parish of *Braunton* and close aforesaid, all causes, as well *ad instantiam partis*, as *ex officio*."

2. That "within the residue of the diocese, the bishop or his chancellor, solely and without concurrence, shall have power to dispense in all causes, to grant all manner of licences, sequestrations, and relaxations, and (generally) to do whatsoever is not formally declared to belong to the said archdeacons, dean and chapter, dean, and custos and college, or to some of them, as aforesaid."

3. "Lastly, that the said bishop, his chancellor, or officers for the time being, shall and may, for ever hereafter, once in every three years complete, visit all the said diocese, except the peculiars of the said dean and chapter, dean, and custos and college of vicars, and their successors."

Unless, therefore, the visitatorial authority of the bishop, as ordinary, over the dean and chapter themselves, was, according to the true construction of this instrument, to be exercised by the dean, as part of his peculiar jurisdiction within the close of the cathedral church, it is not taken away from, but is (by the very terms of this instrument) reserved to the bishop. "Peculiars," as *Ayliffe* states (in a passage cited by Sir *John Nicholl*, at p. 245 of the judgment in *Parham* v. *Templar* (1)), "are called exempt jurisdictions; not because they are under no ordinary, but because they

(1) 3 Phillim. 252.

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are not under the ordinary of the diocese, but have one of their own." The ordinary of the cathedral close of *Exeter*, so far as it is described as a peculiar by this composition, was the dean. But the only matters in respect of which the dean was, according to the terms of the composition, to exercise ordinary jurisdiction within the close, were the grants of probates, not of all persons, but of persons not falling within certain specified classes, and "the hearing and determination of causes," whether *ad instantiam partis* or *ex officio*. The composition does not provide that the dean shall visit himself; still less does it provide that the cathedral church shall be exempt from all ordinary visitation, and subject only to the metropolitan jurisdiction of the archbishop. It is further manifest, that if, by the terms of this composition, the bishop, as ordinary, had been excluded from visiting the dean and chapter or the cathedral, it would have been a total, and not merely a partial, exclusion. Any visitation of the cathedral by the bishop, as ordinary, for any purpose whatever, would (in that view) have been quite as much *ultra vires* as a visitation for the purpose of setting right whatever might be found wrong as to the fabric of the church.

Passing from the letter of the composition itself to the evidence which is before us of the usage and practice, as to visitation, of the cathedral church of *Exeter* since the date of that instrument, their Lordships find that this evidence is altogether adverse to the contention of the Respondents. There is no instance given of the exercise of any jurisdiction by the dean, except one case of brawling within the cathedral, which arose in the year 1827, and which was manifestly a "cause," either *ad instantiam partis* or *ex officio*. Such a cause would no doubt have been cognizable by the dean under the express terms of the composition if the cathedral ought to be deemed part of the close, and it would have been equally cognizable, under the same instrument, by any archdeacon of the diocese, if the brawling had happened within one of that archdeacon's peculiars. But there is no trace of its ever having been supposed or contended, before the arguments in the present case, that the Bishop of *Exeter* had not, over the dean and chapter, and within the cathedral of the diocese, as large and full visitatorial jurisdiction, as ordinary, as any other diocesan bishop has in his

cathedral church. That jurisdiction has been, in practice, exercised on more than one occasion, without objection or protest, and its existence was expressly admitted, in the course of a recent public inquiry, by the dean and chapter.

In 1660 Bishop *Seth Ward* held a primary visitation of this cathedral; and in the articles then exhibited by him, inquiries were made (among other things) into the condition of the fabric generally, and of the roof, windows, seats, floors, towers, and bells. No question appears to have been raised as to his authority so to inquire.

In 1678 Bishop *Lamplugh* held another primary visitation of the cathedral. Articles were exhibited on that occasion substantially similar to those of Bishop *Ward* (though not in exactly the same form); and, in addition to these, the second article inquired "whether any passages or doors had been made in the times of the late rebellion, leading into the cathedral by breaking down the wall thereof, and continued to be so?" The dean and chapter put in their answers to these articles. As to the second article they said "that there was only one door, towards the north-east, that was made in the late times, which had not been walled up (as another door then made had been), because it was a great convenience to several dignitaries of the church and other persons of quality, and was neither indecent itself nor prejudicial to anybody." It appears, however, that by some objector, connected (as is to be presumed) with the cathedral, a presentment was made against the door, which the dean and chapter thus desired to keep open, as having been improperly and illegally made through a private chapel at the north-east end of the church, to the dishonour of the church," and to the prejudice of a particular family which had right of burial there. The bishop, as visitor, adopted this latter view; and he thereupon ordered "that the said door be forthwith shut up, and hereafter not opened; and that, before Candlemas next ensuing, the aforesaid door be taken away, and the wall made up, and the passage restored to the right owner; and that the great gate next the street be by that time taken down and walled up." At a further visitation on the 21st of April, 1680, it was finally certified to the visitor by the dean that this order had been fully obeyed, and that the door in question had been walled up, as directed.

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In 1852, the Dean and Chapter of *Exeter*, in answer to questions addressed to them by the Royal Commissioners for inquiring into the cathedral churches and capitular bodies in *England*, stated that the Bishop of *Exeter* was their visitor; and that the powers of the visitor were "those vested in him by the general law, not modified by any special custom." For the dean, they did not then claim any peculiar jurisdiction further than by stating that he had "archidiaconal authority within the close," which, however, was no longer exercised by him. In Bishop *Voysey's* Statute of 1544 (to which they then referred, as the document in which the duties of the several dignitaries and officers would be found most fully stated), the same statement is found, that the dean had "*jurisdictionem Archidiaconalem in omnibus enumeratis infra clausum Exoniensis Ecclesiæ*," no other jurisdiction of the dean being there mentioned.

Their Lordships are, under these circumstances, unable to agree with the opinion expressed by the learned Dean of Arches against the jurisdiction of the bishop in the present case.

The right of the bishop to visit, as ordinary, in respect of the fabric being established, the question arises whether the order made by him for the removal of the reredos can be sustained. It was first suggested in argument that the Respondents were in the same position as if they were applying for a faculty to authorize its erection, inasmuch as the erection without a faculty was illegal.

Their Lordships cannot accede to this argument of the Appellant's counsel. It was pressed upon them in order to lay the foundation for an exercise of discretion on the part of the bishop even in a case where there might be no breach of the law.

No authority has been cited, and no instance has been produced, in which a grant of any such faculty has been applied for, either in the case of *Exeter Cathedral*, or of any other cathedral, although it is notorious that important alterations in the fabric of most cathedrals have continually been effected.

The argument, which was urged at the Bar, that although a faculty may not strictly be necessary, the express or implied consent of the bishop ought to be obtained for every alteration in the fabric of a cathedral, was equally unsupported by authority; and their Lordships cannot, under these circumstances, conclude either that the bishop, as visitor, has a discretion to order any alteration

in the fabric of the cathedral church, except on some definite legal ground; or that such a discretion, if not possessed by the bishop, could be exercised by the Court of Arches, or by Her Majesty in Council, when adjudicating on an appeal from the bishop's judgment as visitor.

The case before us on the present appeal must therefore be determined with reference to the question whether the structure itself is contrary to the Ecclesiastical Law.

For determining this question their Lordships have proceeded to examine the authorities and documents cited before them in proof of the alleged illegality of the Respondent's proceedings.

At the commencement of the Reformation attention was directed to the numerous representations in churches, either by sculpture or painting, or both, of those who were venerated either as divine persons or as saints of the Church, and to the outward acts of worship or honour paid to these representations or images. In the first year of *Edward* VI. (1547) Injunctions were issued to the clergy and laity by the King, with the advice of the Protector and the Council, purporting to be in continuation of like Injunctions issued by *Henry* VIII., which, amongst other things denounced, as tending to idolatry and superstition, "the offering of money, candles, or tapers to relics or images, or kissing or licking of the same." And the clergy were directed to take down and destroy "such images as they know to have been so abused with pilgrimages or offerings of anything made thereunto, or shall be hereafter censed unto," and to suffer thenceforth "no torches or candles, tapers nor images of wax to be set before any image or picture," but only two lights upon the high altar . . . admonishing their parishioners that images serve for no other purpose but to be a remembrance whereby men may be admonished of the holy lives and conversations of those that the said images do represent; which images, if they do abuse for any other intent, they commit idolatry in the same.

By the 28th of these Injunctions the clergy are ordered "to take away, utterly extinct, and destroy all shrines tables candlesticks trindles or rolls of wax pictures paintings and all other monuments of feigned miracles pilgrimages idolatry and superstition, so that there remain no memory of the same in walls, glass windows, or elsewhere within their churches or houses." The execu-

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tion of these Injunctions was intrusted to the ordinary, and articles were framed to be inquired of in the King's visitation, one of which inquired: "Whether there do remain not taken down in your churches chapels or elsewhere, any misused images with pilgrimages, and whether do remain, not defaced and destroyed, any shrines, coverings of shrines, or any other monument of idolatry superstition and hypocrisy."

A question has been raised as to the authority under which these Injunctions were issued; whether, under the statute 31 Hen. 8, c. 8, giving to the King's proclamations the force of law, or by virtue of the *Act of Supremacy*. The learned Judge in the Court below seems to treat the Injunction as a proclamation under the statute, which statute was soon afterwards repealed; but whether it was so or not appears to their Lordships to be an inquiry not material to the present issue, for the reasons to be afterwards mentioned.

The next document relied upon by the Appellant is a Latin letter headed, "*Mandatum ad amovendas et delendas imagines*," of Archbishop *Cranmer* to the Bishop of *London*, dated the 24th of February, 1547–8, which recites (in English) letters missive (purporting to have been received by the archbishop), signed by certain Lords of the Council, and containing the following passage:—

"After our right hartye recommendations to your Lordship, where now of late in the King's Majestie's visitation amonge other goodlye injunctions commanded to be generally observed throughe all partes of this his highnes realme, one was set forthe, for the taking downe of all such images as had at any tyme been abused with pilgrimages, offerings, or censings; albeit that this said Injunction hath in many partes of the realme ben wel and quyetlye obeyed and executed, yet in many other places muche stryfe and contentyon hath rysen and dayly ryseth, and more and more encreaseth, about the execution of the same, some men beyng so supertytyous or rather wylfull, as they wold by theyr good wylles retayne all such images styll, although they have beene mooste manyfestlye abused, and in some places also the images which by the saide injunctions were taken downe, be now restored and set up againe, and almoste in every place ys contentyon for images,

whether they have been abused or not; and whiles these men go about on both sides contentyouslye to obtaine theyr mindes, contending whether this or that image hath been offered unto, kyssed, censed, or otherwise abused, partyes have in some places been taken in suche sorte, as further inconvenyence is very like to ensue yf remedie be not provided in tyme; considering therefore that allmost in no places of this realme ys any sure quyetness, but where all images be hoolly taken awaye and pulled downe already, to the intent that all contentyon in everye part of this realme for this matter may be clerely taken awaye, and that the lyvely images of Chyste shulde not contende for the deade images, which be things not necessary and without whiche the churches of Christ contynued most goodlye many yeres; We have thought good to signify unto you that his highnes pleasure, with th' advyse and consent of us the Lord Protectour and the reste of the Counsell, ys, that immediately upon the sight hereof, with as convenyent diligence as you maye, you shall not onlye give ordre that all the images remayninge in any church or chappell within your diocese be removed and taken away, but also by your letters signifye unto the reste of the bishopes within your province his hignesse pleasure for the lyke order to be given by them and every of them within their several dioceses; and in th' execution thereof we requyre both you and the reste of the bisshopes foresaid to use suche foresight as the same may be quyetlye donne with as good satisfaction of the people as may be."

The archbishop then directs the bishop to proceed accordingly, and articles appear to have been framed to be inquired of in the visitation of the diocese of *London*, one of which is framed in the very words of the 28th of the King's Injunctions, so far as regards images.

Whatever may have been the legal effect of this mandate, it may be assumed that it was sent under the circumstances stated, and in consequence of the letter set forth as having been sent to the archbishop from the lords of the council.

It appears plain to their Lordships that the Injunctions were directed (3rd and 28th) to the removal or destruction of such images only "as had at any time been abused" by superstitious observances; but the letter refers to the difficulty of distinguishing

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them from others, and to the pretext made for retaining some that had been "manifestly abused" by reason of their alleged exemption from abuse. Accordingly it is directed that, in order to make sure of attaining the original purpose, all the remaining images should be then removed.

This order, or letter, then of the King's Council, explained as it is in its objects and intentions on the face of the document itself, appears to their Lordships to amount to no more than an administrative act or step taken at the time, for the time, and dictated by the necessities peculiar to the time. It did not contain, nor profess to contain, the enunciation of any general law of a permanent character with respect to images. It, no doubt, proceeded on the implied assertion that the worship or abuse of images was contrary to the true doctrine of the Church, then at the commencement of its reformation. But it did not involve all images in a general condemnation, even by implication, for it distinguished between those which had been abused and those which had not, so far as condemnation went, and ordered the removal of all, whether abused or not, for the sake of peace, and for the purpose of insuring obedience to the former orders. Far from denouncing dead images as things unlawful, this document speaks of them "as things not necessary."

The Act of the 3 & 4 Edw. 6, intituled "An Act for the abolishing and putting away divers Books and Images," enacts, by the 1st section, that all books (enumerating many) heretofore used for service of the church, written or printed in the English or Latin tongues, other than such as are or shall be set forth by the King's Majesty, shall be by authority of this present Act clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm or elsewhere within any of the King's dominions.

The 2nd section enacts that, if any person that then had, or thereafter should have, in his custody any such books or images of stone, timber, alabaster, or earth, graven, carved, or painted, which heretofore have been taken out of any church or chapel, or yet stand in any church or chapel, and do not before the last day of June next ensuing deface and destroy, or cause to be defaced and destroyed, the same images and every of them, "and do not deliver

up the books there mentioned in the manner and for the purpose of their destruction therein mentioned, he shall, for every book willingly retained in his hands, incur such penalties as in the Act mentioned." The careless wording of the Act, which omits all penalty with reference to images, induces a suspicion that the introduction of images into the Act was an afterthought; but, be this as it may, this Act would imply the necessity of all persons defacing or destroying or delivering up all images which had already been, or might afterwards be, removed out of churches, and probably, also, the obligation of removing those then remaining in churches, whether abused or not, except in cases falling within the exception of the 6th section of the Act, which provides, that the Act shall not extend "to any image or picture, or any tomb in any church or chapel, or churchyard, only for a monument of any king, prince, or nobleman, or other dead person, which hath not been commonly reputed and taken for a saint; but that such pictures and images may continue in the like manner and form as if the Act had never been had or made."

The exception itself shews the generality in all other respects of the enactment as embracing all images; though it is remarkable that the excepted cases are referred to as occurring in any church or churchyard, whilst the rest of the statute appears to be confined to images contained in or removed from the inside of churches or chapels.

This statute was repealed by 1 Mary, st. 2, c. 2; but that statute was in its turn repealed by 1 Jac. 1, c. 25, s. 48, and the statute of *Edward* was thereby revived. The Act of *James* I. is itself repealed by the 26 & 27 Vict. c. 125. But an express section of that Act provides that, where any Act thereby repealed had the operation of reviving any former Act, such reviver shall not be affected. The Act of *Edward* VI. therefore remains unrepealed.

It is in this state of circumstances that their Lordships deem it unnecessary to consider by what authority the royal Injunctions and the archbishop's mandate may have been originally issued.

Their Lordships concur in the opinion expressed by this tribunal in *Westerton* v. *Liddell* (1), and cited by the learned Judge in the Court below, viz., that the Act "related to the destruction of

(1) Moore's Special Rep.

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images already ordered to be removed, but which either had not been removed, or, having been so, were still retained for private devotion and worship." It may be regarded as a recognition by the Legislature of the validity of these orders (though not expressly referred to), and of the obligation of obedience to them, but it does not go further; and, as with the mandate above referred to, so with this statute, it appears to their Lordships, that the efficacy of the Act of *Edward* was spent upon the definite purpose to which it was directed, and that the Legislature did not thereby make, or intend to make, provision in respect of the subsequent use or abuse of any other images.

Up to this time then, viz., up to and including the Statute of *Edward* VI., the case as to "images" stands thus:—The King's Injunctions in the first year of his reign condemned several superstitious practices with reference to images, such as pilgrimages to particular images, offerings made to them of any kind, kissing or licking, or censing the same, and directed all shrines, pictures, paintings, and other monuments of feigned miracles, pilgrimages, idolatry and superstitions, to be destroyed by the incumbent, so that there remain "no memory of the same in walls, glass windows, or elsewhere within the churches or houses of their parishioners." The metropolitan then communicated to the Bishop of *London* a letter received by him from the Privy Council, with reference apparently to what had been done under the Injunctions, and the difficulty of distinguishing images which had been abused from those which had not, which letter directs a total removal and destruction of all images. This is followed by the statute, and so matters appear to have rested till the reign of *Mary*, when the Act of *Edward* was repealed, and the images, or some of them, were probably restored.

It is remarkable that nothing was done by *Elizabeth* with reference to the revival of the Act of *Edward*, but in the first year of her reign (1559) Injunctions were issued by her, the 23rd of which directed that the clergy should take away, utterly extinct, and destroy all shrines, . . . pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in glass windows, or elsewhere within their churches and houses; and articles, on the

visitation of the Queen, were issued, founded on these Injunctions, the 45th of which inquired whether the clergy knew any that kept in their houses any undefaced images, tables, pictures, paintings, or other monuments of feigned and false miracles, . . . and do adore them, and specially such as have been set up in churches, chapels, and oratories.

In the next year the Queen put forth the following Proclamation:—

"*Elizabeth.*—The Queen's Majesty understanding that by means of sundry people, partly ignorant, partly malicious or covetous, there hath been of late years spoiled and broken certain ancient monuments, some of metal, some of stone, which were erected up as well in churches as in other public places within this realm, only to shew a memory to posterity of the persons there buried, or that had been benefactors to the buildings or dotations of the same churches or public places, and not to nourish any kind of superstition, by which means not only the churches and public places remain at this present day spoiled, broken, and ruinated, to the offence of all noble and gentle hearts, and the extinguishing of the honourable and good memory of sundry virtuous and noble persons deceased, but also the true understanding of divers persons in this realm (who have descended of the blood of the same persons deceased) is thereby so darkened, as the true course of their inheritance may be hereafter interrupted, contrary to justice; besides many other offences that hereof do ensue to the slander of such as either gave or had charge in times past, only to deface monuments of idolatry and false feigned images in churches and abbeys; and therefore, although it be very hard to recover things broken and spoiled, yet both to provide that no such barbarous disorder be hereafter used, and to repair as much of the said monuments as conveniently may be, Her Majesty chargeth and commandeth all manner of persons hereafter to forbear the breaking or defacing of any parcel of any monument, or tomb, or grave, or other inscription and memory of any person deceased, being in any manner of place: or to break any image of kings, princes, or noble estates of this realm, or of any other that have been in times past erected and set up for the only memory of them to their posterity, in common churches, and not for any religious

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honour, or to break down and deface any image in glass windows in any church without consent of the ordinary, upon pain that whosoever shall herein be found to offend, to be committed to the next gaol. . . ."

The words "false," and "feigned images," which frequently occur in these documents, may either refer to images to which particular efficacy was falsely attributed, or (a meaning borne out by some passages in the Homilies) to images falsely alleged to be true likenesses of either the Saviour or any saints, of whom no true likeness existed. But whatever meaning be assigned to these words, the language of both the Injunctions and the Proclamation, is plainly addressed, not to all "pictures, paintings, or monuments, &c.," but to a limited class of them, and this a class tainted with falsehood or superstition. As the Reformation proceeded, and the Articles of Religion came to receive statutory authority, the doctrine of the Church on this subject was plainly set forth.

1 P.D. 351

The 22nd Article of Religion declares that "the Romish doctrine concerning purgatory, pardons, worshipping, and adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of Scripture, but rather repugnant to the Word of God." In other words, it condemns only the abuse of images.

But great stress has been laid in the argument of this case upon the Homilies against the Perils of Idolatry, which are recognised in the 35th Article of Religion (amongst other Homilies) as containing "a godly and wholesome doctrine, and necessary for these times, and therefore are judged to be read in churches by the ministers diligently and distinctly, that they may be understood of the people."

The 46th and 49th Canons give special directions as to the reading of the Homilies, and the 80th Canon orders the Book of Homilies to be provided in each parish.

This recommendation, however, of the Homilies cannot be pressed further than as containing an approbation of "doctrines" therein contained, and even that of a qualified character, as being specially necessary for the times when the Articles were framed and published. Now the Homily against the Peril of Idolatry (contained in several parts) sets forth in very glowing colours the

vanity and folly of paying adoration or worship to images or paintings, but it recognises the original intention of such images or paintings to have been the better instructing of the ignorant, as set forth in the letter of *Gregory* to *Serenus* (cited by the learned Judge in the Court below). The Homily observes, "you may withal note that seeing there is no ground for worshipping of images in *Gregory's* writing but a plain condemnation thereof, that such as do worship images do unjustly allege *Gregory* for them." The Homily, however, proceeds to affirm that the worshipping of images is a necessary consequence of their being allowed to exist, and therefore concludes strongly for their entire abolition, irrespective of actual abuse. Now it is plain that the "doctrine" maintained by the Homily is that of the 22nd Article, and condemns paying "honour and reverence to images as being an act of idolatry, and contrary to the Second Commandment." In the judgment of its author the existence of any image, whether originally intended for instruction or not, is dangerous, as tending to idolatry. This cannot be called doctrine. It is an opinion as to the consequences which might at that time follow the use of representations of sacred objects, and probably the opinion might then be well founded; whilst it is, on the contrary, notorious that numerous sculptures and pictures representing the Saviour and Apostles, and other holy men exist, and have existed for more than two centuries in and outside of our churches, to which no worship has been paid. The old associations were broken off, and the old "monuments of superstition" had either been removed, or become innocuous, before the reign of *Elizabeth* was closed.

In the 9th of *Elizabeth*, on a visitation by Archbishop *Parker*, Articles were exhibited, the 6th of which inquired whether any taught "that any man is borne with which do extol any superstitious religion or religious pilgrimages, lighting of candles, kissing, kneeling, or ducking to images." And at another visitation in the 12th of *Elizabeth*, by the same metropolitan, articles were exhibited, by the 6th of which inquiry is made "whether images and all other monuments of idolatry and superstition be destroyed and abolished, and whether your churches and chancels be well adorned and conveniently kept without waste, destruction, or abuse of anything. Whether the rood loft be pulled down according to

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the order prescribed, and if the partition between the chancel and the church be kept."

These Articles appear to observe the distinction noticed in the Queen's proclamation already referred to between the representations which had been abused and those which had not. It is not improbable that there had existed some conspicuous representation of a crucifix in the rood-lofts which had been abused, and therefore was directed to be removed.

In *Cardwell's* 'Annals' (Vol. i. No. LXXVII.) are Articles intended to have been exhibited at Archbishop *Grindal's* visitation in the 18th *Elizabeth*, the 4th of which inquires "whether rood-lofts be taken down to the cross-beam," and the 6th inquires whether (amongst other things), "all images and other relics and monuments of superstition and idolatry be utterly defaced, broken, and destroyed, and if not, where and in whose custody they remain." It appears to be doubtful whether these Articles were ever exhibited. From this time, and notwithstanding the revival in the time of *James* I. of the Act of 3 & 4 Edw. 6, there appears to have been neither further legislation nor inquiry with reference to pictorial or sculptured representations of sacred subjects in churches.

What, then, is the character of the sculpture on the reredos in the case before their Lordships? For what purpose has it been set up? To what end is it used? and is it in danger of being abused? It is a sculptured work in high relief, in which are three compartments. That in the centre represents the Ascension of our Lord, in which the figure of our ascending Lord is separated by a sort of border from the figures of the Apostles, who are gazing upward. The right compartment represents the Transfiguration, and the left the Descent of the Holy Ghost on the Day of Pentecost. The representations appear to be similar to those with which every one is familiar in regard to the sacred subjects in question. All the figures are delineated as forming part of the connected representation of the historical subject. The Ascension necessarily represents our Lord as separated from the Apostles, who are gazing at Him on His ascent. As finials to the architectural form of the reredos, there is on each side a separate figure of an angel. It is plain to their Lordships that the whole erection has been set up for the purpose of decoration only.

It is not suggested that any superstitious reverence has been or is likely to be paid to any figures forming part of the reredos, and their Lordships are unable to discover anything which distinguishes this representation from the numerous sculptured and painted representations of portions of the sacred history to be found in many of our cathedrals and parish churches, and which have been proved, by long experience, to be capable of remaining there without giving occasion to any idolatrous or superstitious practices. Their Lordships are of opinion that such a decorative work would be lawful in any other part of the church; and, if so, they are not aware of any contravention of the laws ecclesiastical by reason of its erection in the particular place which it now occupies. Their Lordships have not adverted to the case of *Cocke and Others* v. *Tallents* (1) mentioned by the learned Judge in the Court below, because they have been furnished by the Registrar with a full note of that case, which appears to have proceeded on consent.

Their Lordships desire it to be clearly understood that nothing decided in this case affects the question of superstitious regard being paid, contrary to the 22nd Article of Religion, to any representations or images that are, or may at any time be, set up in churches. The law will at all times be sufficiently strong to correct and control any such abuse: but their Lordships are of opinion that the sculpture in question is not liable to be impugned in that respect. Their Lordships will, therefore, recommend Her Majesty to reverse the decree pronounced by the Dean of Arches, so far as it reversed the decree of the Lord Bishop of *Exeter* in pronouncing for his jurisdiction as visitor and ordinary of the cathedral church of *St. Peter*, in *Exeter;* but to affirm the decree of the Dean of the Arches in all other respects; and their Lordships, regard being had to the argument in the Court below and before them, in opposition to the jurisdiction of the Lord Bishop, do not decree the payment of any costs of this appeal by any party. Indeed, they understood it to be stated at the Bar, by the counsel for the Respondents, that they did not ask for costs.

Proctors for the Appellant: Messrs. *Moore & Currey.*
Proctor for the Respondents: Mr. *Skipwith.*

(1) Not reported, see Law Rep. 4 A. & E. p. 330.

J. C.*
1874
Dec. 9, 10, 19.

THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE AND OTHERS . . . . . } APPELLANTS;

AND

THE OWNERS OF THE "F. T. BARRY," AND THE "AUBURN" . . . . . } RESPONDENTS.

2 P.D. 188.
8 App. Ca. 561.

THE COMPAGNIE GÉNÉRALE TRANSATLANTIQUE AND OTHERS . . . . . } APPELLANTS;

AND

THE OWNERS OF THE "SPRAY" . . . RESPONDENTS.

THE "AMÉRIQUE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Salvage Services—Quantum of Remuneration.

Although the *quantum* of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered. Where the Court below had awarded an exceptional and excessive amount of remuneration solely from regard to the value of the property salved, their Lordships, notwithstanding their general rule of non-interference upon a question of mere discretion, reduced the said amount by two-fifths.

APPEAL from a decree (July 16th, 1874) of the Judge of the High Court of Admiralty of *England* in two consolidated causes of salvage. The facts of the case are set forth in the judgment of their Lordships.

Mr. *Butt*, Q.C., Mr. *Phillimore*, and Mr. *Stubbs*, for the owners of the *Amérique*.

Mr. *Milward*, Q.C., and Mr. *R. E. Webster*, for the owners of the *F. T. Barry* and the *Auburn*.

Sir *H. James*, Q.C., and Mr. *Pritchard* (Mr. *E. C. Clarkson* with them), for the owners of the *Spray*.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

The cases cited were *The Syrian* (1); *The Blenden Hall* (2); *The Kathleen* (3); and see notes to *Pritchard's* Digest, p. 837, as to the French law of salvage: *The Thetis* (4); *The Carrier Dove* (5); *The William Beckford* (6); *The Industry* (7); *The James Dixon* (8); *The Salacia* (9).

The judgment of their Lordships was delivered by

SIR JAMES COLVILE:—

These appeals are upon a question of salvage. The vessel salved, the *Amérique*, was a very large iron screw steamer of 4,600 tons register, running habitually as a passenger vessel between *Havre* and *New York*. In the afternoon of the 14th of April, 1874, being on her return voyage from *New York*, with eighty-three passengers and a very valuable cargo of merchandize, she was abandoned by her master, crew, and passengers, under the apprehension that she was sinking, and left to the mercy of the wind and waves, when about seventy or eighty miles west of *Ushant*.

In that condition she was first seen early in the morning of the 15th by the bark *Auburn*, which, having made for her, succeeded in putting four men on board of her about 10.30 A.M. Very shortly afterwards she was also boarded by a boat's crew from the screw steamship *Spray*, consisting of the mate of that vessel and two other men, who were afterwards joined by the engineer and a fireman from the *Spray*. The *Amérique* when first boarded was found to be on the starboard tack with two close-reefed topsails; the foot of her mizen was out and she had a strong list to port. On examination it was found that she had a good deal of water in her, coming partly through a port of which the glass was out; that the pumps were choked; and that the water was too high to allow the mate and engineer to get at the machinery. From

(1) 2 Maritime Law Cases, 387.
(2) 1 Dodson, 414; S. C. 2 Pritchard's Digest, 841.
(3) Unreported.
(4) 2 Knapp, 390.
(5) 2 Moore, P. C. (N.S.) 243.
(6) 3 C. Rob. 355, and see Pritch. Dig. p. 730, par. 9.
(7) 3 Hagg. 204; and see Pritch. Dig. p. 731, par. 14.
(8) 2 L. T. (N.S.) 696; and see Pritch. Dig. p. 731, par. 17.
(9) 2 Hagg. 263; and see Pritch. Dig. p. 731, par. 19.

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what they observed, and from the fact that her own master and crew had abandoned her, those who made the examination might fairly conclude that the condition of this derelict vessel was far worse than it afterwards proved to be. The master and crew of the *Spray*, with the aid of two men whom the master of the *Auburn* agreed to leave for that purpose, nevertheless undertook the task of taking the *Amérique* to a port of safety. It is unnecessary to state in detail the measures which they adopted for this purpose. It is sufficient to say that the *Spray*, having towed the *Amérique* during the whole of the night of the 15th, at the rate of about two knots an hour, sighted the *F. T. Barry* early in the morning of the 16th, made signals to her, and ultimately agreed with her that she should assist in towing the *Amérique* to a safe port. The two steamers, with more or less of misadventure, succeeded in getting the *Amérique* safely into *Plymouth* on the evening of the 18th of April; but she continued to be under charge of the master and crew of the *Spray* until 7 P.M. of the following day, when she was taken in charge by the collector of customs.

The admitted value of the vessel and cargo thus salved is £190,000.

The *Spray* was a screw steamship of 393 tons net register, manned by a crew of sixteen hands, all told, with engines of 80 horse-power nominal, but working up to 390 horse-power. She had left *Newport* on the 12th of April laden with coals and bound for *Gibraltar*. And it is pleaded that at the time of the services she was of the value of about £15,000; her cargo being of the value of £650; and her freight out and home being of the value of £1270. She does not appear to have sustained any serious damage during the service, beyond breaking her hawser, and having two butts on the port side torn out. In fact, by her pleading she assesses this damage at only £60; the loss incurred by the owners by reason of the deviation from her voyage at £130; and the extraordinary expenses incurred by them at £379 6*s.* 9*d.*

The *F. T. Barry* is an iron screw steamship of the burthen of 545 tons net register, valued at about £20,000, and propelled by two compound direct acting engines of 99 horse-power, working up to 400. Her crew at the time of the salvage service consisted of her master and twenty-two hands. She was homeward bound,

having left *Villa Real* in *Portugal*, with a cargo of mineral ore and fruit of the value of £4000 for *Newcastle*, on the 9th of April, 1874. She seems to have sustained damage to the amount of £600; and to have been delayed on her voyage for repairs for about twenty-one days.

There were two distinct suits for salvage. The one by the owners, master, and crew of the *Spray;* the other by the owners, masters, and crews of both the *F. T. Barry* and of the *Auburn*. These suits were heard together before the Judge of the Admiralty Court, who awarded by way of salvage the gross sum of £30,000, which he divided in the following proportions, viz.:— £15,500 to the *Spray;* £14,000 to the *F. T. Barry*; and £500 to the *Auburn*—these sums to be taken in full satisfaction of all damages and expenses, as well as in compensation for the salvage services.

The present appeal is against that decision.

That the vessel salved was a derelict, and that she and her cargo were saved by the exertions of the Respondents; that their services were in a high degree meritorious and deserved a large measure of remuneration, are propositions which are not disputed by the Appellants. But they contend that the sum awarded by the learned Judge is out of all proportion to those services, and on the ground of its exorbitancy ought to be reduced by this Tribunal sitting as a Court of Appeal.

The jurisdiction thus invoked is one which this Committee, and also as would appear from *The Cuba* (1) the Court of Admiralty, when sitting as an Appellate Court, has always been slow to exercise. The general rule of non-interference has been within the last few years stated and enforced at this Board in *The Clarisse* and *The Neptune*, both reported in 12 Moore's P.C. Reports; *The Carrier Dove* (2), *The Fusilier* (3), and *The England* (4). The object of the appeal was in *The Clarisse* and *The England* to increase in the other cases, to reduce the amount awarded. The general rule is nowhere better stated than in *The Clarisse*, in which Lord Justice *Knight Bruce* said: "It is a settled rule, and one of great utility with reference to cases of this description, that

(1) 1 Lush. 14; S. C. 6 Jur. (N.S.) 152.
(2) 2 Moore, P. C. (N.S.) 243.
(3) 3 Moore, P. C. (N.S.) 269.
(4) 5 Moore, P. C. (N.S.) 344.

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the difference (that is the difference between the sum awarded, and that which the Appellate Court may think ought to have been awarded) must be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion." And in *The Neptune* Lord *Kingsdown*, after citing this passage from the judgment in *The Clarisse*, observed that the same rule must apply in diminishing the amount of compensation which is applied in increasing it.

The cases which establish and illustrate the exception to the general rule are *The Thetis* (1), *The Scindia and True Blue* (2), and *The Glenduror* (3), in which the amount awarded was increased, and *The Inca* (4), and *The Chetah* (5), in which it was reduced. It may be observed that, in delivering judgment in *The Chetah*, Lord *Chelmsford* stated that "it had been agreed by the counsel on both sides that no case was to be found where, upon an appeal from a decree for salvage services, the amount awarded had ever been reduced." But this statement of the authorities was obviously inaccurate, since the case of *The Inca*, in which the amount awarded was largely reduced, and in which the judgment of this Board was delivered by Dr. *Lushington*, was decided in 1858. Upon the authorities it cannot be doubted, nor, indeed, was it denied at the Bar, that the amount awarded may be reduced if the Appellate Court is satisfied (to use the words of Dr. *Lushington* in *The Cuba*), that it "is so exorbitant, so manifestly excessive, that it would not be just to confirm it."

To establish a case for the exercise of this exceptional and delicate jurisdiction it would obviously be material to shew that the Judge of first instance, in estimating the amount of remuneration to be awarded, had miscarried, by allowing his judgment to be influenced by something which ought not to have influenced it at all; or else either by giving undue consideration, or by failing to give due consideration, to some circumstance fairly within his consideration. And accordingly, the learned counsel for the Appellants have laboured to shew some such miscarriage in the judgment under appeal.

(1) 2 Knapp, 390.
(2) 4 Moore, P. C. (N.S.) 101.
(3) 8 Moore, P. C. (N.S.) 22.
(4) 12 Moore, P. C. 189.
(5) 5 Moore, P. C. (N.S.) 178.

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Their arguments were founded first, on the observations made by the learned Judge in pronouncing against the defence, founded on alleged acts of pillage on the part of the salvors, which was originally set up by the Appellants. Their Lordships, however, cannot see the slightest ground for supposing that, whatever the learned Judge may have felt touching this plea, he allowed that feeling in any degree to affect his judgment in estimating the amount of remuneration which he awarded. Another argument was more plausibly founded on the reference made by the learned Judge to the French law, and to the compensation which a French Court would have awarded to the salvors had they carried this derelict vessel into *Brest*. It must, in their Lordships' opinion, be admitted that, if the judgment of the learned Judge was influenced by that consideration, it was not properly so influenced. The consideration how the Courts of another country, and that the country of the owners of the vessel salved, would deal with a subject *communis juris*, like salvage, might be legitimate and even useful if the Courts of that country proceeded upon the same principles as those which govern our Courts. But where it appears that the French Courts are governed by a positive rule of law which prescribes that a fixed proportion of the value of a derelict is to be awarded to the salvors, and that our Courts have for nearly two centuries repudiated that hard and fast rule of proportion, it is obvious that nothing can be deduced from the French law except an inference that the Appellants might have been in a worse case if their ship had been carried into a French port. It affords no ingredient which can legitimately be imported into the calculation of the sum to be decreed against them in an English Court.

Their Lordships however though unable to account altogether for this reference to the law of *France*, find that in the paragraph in the judgment which immediately follows it, the learned Judge expressly stated that the case was to be decided by the *lex fori*; and their Lordships are therefore not satisfied that he did not intend to decide it upon the principles by which his own Court is habitually governed without reference to the French law. They will therefore deal with the question before them as simply one of alleged excess or exorbitancy.

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It seems to be indisputable that the amount awarded in this case is larger than any that was ever awarded by an English Court of Admiralty, except that given in the case of *The Thetis* (1). The services in that case however were of the highest merit. They lasted during many months; they involved the use of ingenious and complicated machinery; actual loss of life in at least one case; actual loss of health in many cases; great hardships, exposure, and privations to all actively concerned in them. In the present case their Lordships, without wishing in the slightest degree to detract from the courage with which the salvors undertook and the ability with which they performed the services in question, cannot but observe that those services considered with reference to their duration, to the danger to life incurred by the men, to the damage or risk of damage incurred by the vessels employed, and to the consequences or probable consequences of their deviations from the voyages on which they were employed, fall far short of services which in other cases, and even in cases of derelict, have been remunerated by much smaller sums. It follows then, that the value of the property salved is the consideration on which if at all this exceptional award of remuneration is to be justified. And this raises the question to what extent, if any, undue effect has been given to that consideration.

It was argued on the authority of a case decided by Dr. *Lushington* in 1866 (*The Syrian*, reported in 2 Maritime Law Cases, p. 387) that the value of the property salved is material only in so far as it supplies a fund adequate to the payment of a liberal remuneration for the services rendered; and that it ought not further to affect the measure of that remuneration. The passage in Dr. *Lushington's* judgment which is relied upon is as follows: "In dealing with the present case, the Court also bears in mind that there is a large amount of property salved; but for the single purpose of remembering that it is enabled out of an ample fund fitly to remunerate meritorious services well performed; and the Court does not hold the large value of the property salved as a fund for attempting to extort from the owners of that property or from the underwriters, as the case may be, more than full recompense for such services." Their Lordships do not think that this

(1) 2 Knapp, 390.

passage can fairly be taken to import a ruling that the *quantum* of remuneration is not in any degree to be affected by the value of the property salved. Such a ruling would be hardly consistent with what the same learned Judge has laid down in his judgment delivered by him at this Board in the case of *The True Blue* (1) in 1866. He then cited what Lord *Stowell* had laid down in *The Aquila* (2) to the effect that "the proper mode of considering the question is, what is the fit and proper amount with reference to all the circumstances including the value of the property salved and the risk to the property of the salvors?" And at p. 106 he assigns the value of the vessel salved as a ground on which their Lordships ought to increase the sum awarded by way of salvage remuneration by the Court below. That the value of the property salved is, to some extent, to be treated as an ingredient in the calculation of the *quantum* of salvage remuneration, is a proposition which might be supported by a long series of decisions, beginning with those of Lord *Stowell* in *The William Beckford* (3), and Sir *John Nicholl* in *The Industry* (4), and coming down to the present time. And their Lordships do not conceive that it was the intention of the learned Judge who decided the case of *The Syrian* to run counter to, or even to qualify the decisions of his predecessors on this point. The rule seems to be that though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered. And this is consistent with what is said by Lord *Stowell* in *The Blenden Hall* (5): "In fixing a proportion of the value the Court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason, that in property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation."

Applying these principles, their Lordships, with the most anxious desire not to infringe the wholesome rule which allows great lati-

(1) 4 Moore, P. C. (N.S.) 104.
(2) 1 C. Rob. 37.
(3) 3 C. Rob. 355.
(4) 3 Hagg. 208.
(5) 1 Dodson, 421.

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tude to the discretion of the Court of first instance in cases of this description, have been unable to resist the conclusion that the learned Judge has given undue weight in this case to the value of the property salved, and has consequently awarded a sum which, having regard to the services rendered, their Lordships must pronounce to be excessive. Taking into consideration all the circumstances of the case, the nature and duration of the services, and also the fact dwelt upon by the learned Judge that the merit of the salvors was enhanced by their removing what might have proved a dangerous obstacle to navigation, and giving the utmost weight due to the value of the property salved, their Lordships are of opinion that £18,000 is the utmost amount that can be given consistently with justice to the owners of the *Amérique*, and the rules which govern the ordinary practice of Courts of Admiralty in *England*. And they will humbly advise Her Majesty that the sum awarded be reduced to that amount. Following the precedents of *The Inca* (1) and *The Chetah* (2), they think that each party should bear their own costs of this appeal. They do not propose to alter the proportions in which the judgment under appeal has apportioned the sum awarded amongst the different classes of salvors, and the result of their Lordships' judgment will be that the sum awarded to each class will be diminished by two-fifths.

Solicitors for the owners of the *Amérique*: Messrs. *Stokes, Saunders, & Stokes.*

Solicitor for the owners of the *F. T. Barry*: Mr. *T. Cooper.*

Solicitors for the owners of the *Spray*: Messrs. *Pritchard & Sons.*

(1) 12 Moore, P. C. 189. (2) 5 Moore, P. C. (N.S.) 178.

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ABANDONMENT OF SHIP: *See* MARINE INSURANCE.

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CERTIFICATE FROM BOARD OF LAND AND WORKS: *See* CONSTRUCTION OF SECT. 98 OF VICTORIA LAND ACT, 1869.

CODE NAPOLÉON.] The domain of *R. B.*, though consisting of different parcels, was held as one subject, in certain definite but undivided shares, by the *communistes* (some of whom were infants) under titles which were not traced or traceable to a common origin. On the 3rd of May, 1859, it was sold by licitation, *N. C.* and his wife, already entitled to five-eighths share thereof, being declared the purchasers. The purchase-money remaining unpaid, the co-heirs of *P.* and of his wife, being entitled to the three-eighths share which formed the residue of the domain, were entitled to that proportion of the purchase-money.—In September, 1866, the domain was again sold at the instance of *N. C.'s* creditors to the Respondent. The balance of the purchase-money paid by him was claimed by the Appellants, who had acquired by subrogation, in respect of debts incurred by *N. C.* and *P.* jointly, or by one or other of them singly, before the sale of 1859, the rights of *N. C.* and *P.* in the fund. The said balance was also claimed by the Respondent as the assignee of certain creditors of *N. C.*, whose debts were incurred after the sale of 1859.—The co-licitants of 1859 did not inscribe their privilege in respect of the unpaid purchase-money within sixty days, under Art. 2109 of the Code: the Appellants did not after the licitation inscribe their claims against *N. C.* as charges upon the whole estate in his hands; nor their claims against the estate of *P.* as charges upon what might be coming to that estate; but on the 21st of April, 1860, the *Conservateur des Hypothèques, ex officio*, under Art. 2108, inscribed a privilege in favour of the whole body of co-licitants, as unpaid vendors, for the whole amount of the unpaid purchase-money.—The debts in respect of which the Respondent claimed were all duly inscribed as *hypothèques* subsequent to the 21st of April, 1860:—*Held*, that by force of the French law relating to "inscription," the Appellants had lost their priority, and that their claims must be postponed to that of the Respondent; because, first, the licitation of 1859 having been purposely taken with a view to a partition and the cesser of indivision between the *communistes*, must be regarded as a partition, and not as a sale; second, the co-licitants were within the principle of Art. 883, and as *co-partageants* lost their privilege in respect of unpaid purchase-money by their omission to inscribe it within sixty days under Art. 2109; third, although the privilege degenerated into a *hypothèque*, yet the *ex officio* inscription of the 21st of April, 1860, was not tantamount to an inscription of a *hypothèque* under Art. 2148. Such inscription operated as notice that the whole purchase-money was unpaid, but did not confer priority of charge under the Code in respect of a particular share thereof. COURTAUX *v.* HEWETSON - - - - - - 407

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CONSTRUCTION OF SECT. 98 OF LAND ACT, 1869.] A lessee under the *Land Act*, 1862, and the 7th section of the *Amending Land Act* of 1865, who has obtained a certificate under the *Transfer of Land Act*, 1866, and has performed all the obligations under his lease, including the obligation to improve, imposed by sect. 36 of the *Land Act*, 1862, and has incurred no penalty, is entitled to a grant of his allotment in fee without obtaining a certificate under sect. 98 of the *Land Act*, 1869, from the Board of Land and Works that such last-mentioned obligation has been fulfilled. —Sect. 98 applies solely to cases where a penalty has been incurred. According to the true construction thereof, whenever a penalty has been incurred the governor may demand it before issuing a grant, but it is not made obligatory on him to do so; provided that no grant shall be issued when a penalty has been once incurred, unless the applicant shall have obtained a certificate of the board that the provisions referred to in the section have been at some previous time complied

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with, or, failing that, has paid the penalty. Winter *v.* Attorney-General of Victoria 378

CONSTRUCTIVE ACCEPTANCE OF NOTICE OF ABANDONMENT: *See* Marine Insurance.

CROWN LANDS ALIENATION ACT, 1861, s. 18.] In a suit for a declaration that the Respondent was trustee for the Appellant of land conditionally purchased by the former under the *New South Wales Crown Lands Alienation Act*, 1861, with the moneys of the latter, and for a consequent order for conveyance in accordance with a written agreement whereby the Respondent had bound himself to fulfil the statutory conditions of purchase, and thereafter to transfer to the Appellant; the Respondent pleaded that such agreement was illegal, and contrary to the spirit and policy of the said Act, and that, therefore, the Appellant was not entitled to the transfer sought:—*Held* (reversing the decree of the Supreme Court), that there should be a declaration that the legal title of the Respondent as purchaser was held by him as trustee for the Appellant, and a direction that the Respondent do proceed to complete the purchase according to the terms thereof, and thereafter to execute a proper conveyance to the Appellant. The agreement, admittedly not immoral or against public policy, is not contrary to the terms of the 18th section of the said Act, and cannot be annulled or tainted with illegality on any conjectural view of the policy of the Act. Barton *v.* Muir - - - - - - 134

CROWN REMEDIES AND LIABILITY STATUTE, 1865: *See* Victoria Land Act.

DAMAGE.] The steamship *A.* found at a foreign port the *S.*, a screw steamship, totally disabled in her machinery; both vessels belonged to the same owner. The captain of the *A.*, to protect his employers' interest and earn salvage from the owners of the cargo of *S.*, took the *S.* in tow, and towed her into the *English Channel*, and whilst so doing came into collision with a sailing-ship close hauled on the starboard tack. The damage done by the *A.* caused the sailing-ship to sink, but before she sank the *S.* ranged up alongside of her and came into contact with her. The *A.* first saw the green light of the ship at a distance of three quarters of a mile, and then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles' distance the *A.* and *S.*, with a great length of hawser between them, and the red lights of both, and kept her course:—*Held*, first, that the *A.* was to blame for the collision:—*Held*, also (reversing the decision of the High Court of Admiralty) that, having regard to the exceptional circumstances under which the towing was undertaken, the governing as well as the motive power being wholly with the *A.*, the *S.* was not liable to be condemned in damages occasioned by the collision. The *S.* cannot be deemed, in intendment of law, to be one vessel with the *A.*, or liable for her negligence.—*The Cleadon* (14 Moore's P. C. Cases, 97) distinguished. Union Steamship Company *v.* The Owners of the Aracan - 127

DAMAGES: *See* Merchant Shipping Act Amendment Act.

DAMAGES FOR FALSE RETURN OF RESCUE WITHOUT PROOF OF MALICE OR WANT OF PROBABLE CAUSE: *See* Sheriff of New South Wales.

DISCRETION OF THE LOWER COURT: *See* Salvage Services.

DISTRIBUTION OF LEGISLATIVE POWER.] 1. *Held*, that the Act of the provincial legislature of *Quebec* (33 Vict. c. 58), which purported to relieve by legislation the appellant society, appearing on the face of the Act to have been in a state of extreme financial embarrassment, is within the legislative capacity of that legislature.—The Act related expressly to "a matter merely of a local or private nature in the province," which, by the 92nd sect. of the *British North America Act*, 1867, passed by the Imperial Parliament, is assigned to the exclusive competency of the provincial legislature; and does not fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the last-mentioned Act reserved for the exclusive legislative authority of the Parliament of Canada. L'Union St. Jacques de Montreal *v.* Bélisle - - - 31

2. —— *Held*, that the Act of the provincial legislature of *New Brunswick* (33 Vict. c. 47), intituled "an Act to authorize the issuing of debentures on the credit of the lower district of the parish of *St. Stephen*, in the county of *Charlotte*," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorized by statute, is within the legislative capacity of that legislature.—Under art. 2 of sect. 92 of the *British North America Act*, 1867, passed by the Imperial Parliament, the provincial legislature is enabled to impose direct taxation for a local purpose upon a particular locality within the province.—The Act in question relates to "a matter of a merely local or private nature in the province," which by the 92nd section of the Imperial Act is assigned to the exclusive competency of the provincial legislature, and does not relate to the railway, or any local work or undertaking within the excepted subjects mentioned in art. 10, sub-sect. (*a*) of the said section. —*L'Union St. Jacques de Montreal* v. *Dame Julie Bélisle* (Law Rep. 6 P. C. 31) approved. Dow *v.* Black - - - - - - 272

ECCLESIASTICAL BURIAL.] *G.*, a lay Roman Catholic parishioner of *Montreal*, on the 18th of November, 1869, died, a member of the "*Institut Canadien*," a literary society which had incurred ecclesiastical censures. In his lifetime a pastoral letter of the Bishop of *Montreal* had forbidden such membership on pain of being deprived of the Sacrament "*même à l'article de la mort.*" During illness the priest who administered unction had refused to administer Holy Communion; and at his death six years thereafter the *curé* of *Montreal*, under the direction of the bishop, refused "*la sépulture ecclésiastique*," after request duly made in that behalf; that is to say, the said *curé* refused burial in the larger part of the local cemetery, in which Roman Catholics are usually

ECCLESIASTICAL BURIAL—*continued.*

buried with the rites of the church, and in which the graves are consecrated; but he offered burial without rites in the smaller or reserved part, in which the graves are never consecrated, and in which are buried unbaptized infants, criminals, and those who have died "*sans les secours ou les sacrements de l'Église.*" This proposal was rejected, though *G.'s* widow offered to accept burial in the larger part without religious services.—On a petition by *G.'s* widow for a mandamus to the Respondents upon receipt of the customary fees to bury *G.'s* body in the said cemetery conformably to usage and law, and to enter such burial in the civil register, a writ of summons was issued by the Superior Court which, in substance, called upon the Respondents to shew cause why a writ of mandamus should not be issued. Thereupon the Respondents petitioned, *inter alia*, that the writ being of summons and not of mandamus, might be annulled for irregularity; traversed the Plaintiff's petition and pleaded, first, the irregularity above mentioned; secondly, that they had not refused, but had offered such burial as *G.* was entitled to; thirdly, that they were legal proprietors of the cemetery, free from civil interference or control as respects the service of religion and the exercise of its ceremonies, and were legally entitled to point out the precise spot in the cemetery where each burial was to be made; that they were also civil officers within certain limits, and civilly responsible in that capacity only; that they had offered such burial, and refused nothing but ecclesiastical burial, on the ground that *G.* had been for ten years previously to his death "notoriously and publicly subject to canonical penalties," resulting from the before-mentioned membership, and at the direction of the proper ecclesiastical authorities. They further, in special replication to the Plaintiff's answer, denied that the civil Courts could examine the grounds of refusing ecclesiastical burial, which they nevertheless specified, averring that in consequence of the premises *G.* must be considered "*un pécheur public*," and as such deprived of ecclesiastical burial by the Roman Catholic ritual. —*Held*, firstly, that the writ of summons was in proper form according to the Code of Proeedure in *Canada*:—Secondly, that *G.* never having been excommunicated *nominatim*, and never having been adjudged or proved to be "*un pécheur public*" within the meaning of the *Quebec* ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the *Quebec* ritual, or any law binding upon Roman Catholics in *Canada*, justify the denial of ecclesiastical sepulture to his remains.—Thirdly, that the Respondents, who were sued in their corporate capacity as holders of land and administrators of the cemetery, were bound to give to *G.'s* remains burial in the larger part of the cemetery, on payment of the accustomed fees; and that a peremptory writ of mandamus should be issued accordingly.—*Quære*, whether their Lordships would have power in a suit properly framed for that purpose to order the performance of the usual religious rites.—Although the Roman Catholic Church in *Canada* may, on the conquest in 1762, have ceased to be an established church

ECCLESIASTICAL BURIAL—*continued.*

in the full sense of the term, it nevertheless continued to be a church recognised by the state, retaining its endowments and continuing to have certain rights (*e.g.*, the perception of *dimes* from its members) enforceable at law.—Although the Civil Courts in *Canada* may not be competent to entertain a suit in the nature of the *appel comme d'abus*," yet the jurisprudence and precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in *Canada*.—*Long* v. *The Bishop of Capetown* (1 Moore, P. C. (N.S.) 461) approved.—Even if the Roman Catholic Church in *Canada* were to be regarded merely as a private and voluntary religious society resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws and rules of the tribunal or authority which has inflicted the alleged injury, and to ascertain whether the act complained of was in accordance with the law and rules and discipline of the Roman Catholic Church which obtain in *Lower Canada*, and whether the sentence, if any, by which it is sought to be justified was regularly pronounced by competent authority. —*Semble*: The Ecclesiastical Law which now governs Roman Catholics in *Lower Canada* must be taken to be identical with that which governed the French province of *Quebec*; except so far as modifications are proved to have been introduced by valid consensual contract.—Their Lordships approved the refusal by the Court of Queen's Bench to receive a petition of recusation against the Judges, alleging that they acknowledged the Roman authority, and were thereby disqualified to try whether the civil power can entertain an "*appel comme d'abus.*" BROWN *v.* CURÉ, &c., DE MONTREAL - - - - - - 157

ENGLISH LAW IN PENANG.] A testatrix, after appointing four executors, made over to them by her will "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned;" and after directing them to preserve certain houses as a family house, and giving certain specific bequests, disposed of the residue of her estate as follows:—"As regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just":—*Held*, that, according to the true construction of the above clause, there was no absolute gift to the executors as individuals. The residue was not severed from the trust with which the testatrix had clothed all her property in the hands of her executors, but although a trust was intended to be created, it failed for want of adequate expression of it.—A gift "of the upper storey of four specific houses or shops to be occupied by the several members and descendants of *K. S. C.* and *L. K. W.* as already proposed;" *i.e.*,

ENGLISH LAW IN PENANG—*continued.*
as the context shewed, as a family house for the use of two separate families, *held* to be void for uncertainty, and as denoting an intention to create a perpetuity.—A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold," is void as a devise in perpetuity.—A direction "that a house for performing religious ceremonies to my late husband and myself be erected" is void; such a devise being in perpetuity, and not for a charitable use.—The law of *England* must, having regard to the Royal Charters of 1807, 1826, and 1855, be taken to be the law of *Penang* so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. English statutes, therefore, in their nature inapplicable to *Penang* are not introduced along with the general law of *England*.—*Mayor of Lyons* v. *East India Company* (1 Moore, P.C. 175) approved.—The rule however which prevails in *England* against perpetuities, which exists independently of statutes, and is founded upon public policy, is part of the law of the colony; so, also, the exception to that rule which exists in favour of charitable uses, passes with the rule into the said law.—*Choah Choon Nioh* v. *Spottiswoode* (Wood's Oriental Cases) approved.—The power of appeal to Her Majesty, and the authority of the Supreme Court of the *Straits Settlement* to grant leave to do so, contained in the letters patent of the Queen of the 10th of August, 1855, were not abrogated by Ordinance No. 5 of 1868, establishing the present Supreme Court. All the provisions of the repealed letters patent applicable to the old Court were virtually re-enacted by the Ordinance, and made applicable to the new Court which was put in its place. YEAP CHEAH NEO *v.* ONG CHENG NEO - - - - - - - 381

FABRIQUE.] On the 9th of August, 1868, the *curé* of the parish of *V.* was appointed the special attorney of the "*œuvre et fabrique*," at a meeting of the *curé* and present and past *marguilliers* of the *fabrique*, to execute a resolution to which the meeting had come to oppose the formation by the Respondents (the municipal council of *V.*) of a street across the land of the *fabrique* occupied by the *curé*.—In an action brought thereafter by the *curé* in the names of the Appellants against the Respondents, praying that the proceedings of the latter, as to the making of the street, might be declared null and illegal, for an injunction and for damages. Plea: "*La fin de non-recevoir*," to the effect that the Appellants were not competent to bring the action, inasmuch as they were not authorized to do so by the parishioners regularly convened. Replication: the "*autorisation*" given was sufficient, and otherwise could only be questioned by the parishioners and "*fabriciens*" themselves.—*Held*, that the "*autorisation*" was insufficient and a nullity, and that the plea of "*La fin de non-recevoir*" was correct. In all questions of grave consequence affecting their parish the parishioners, in the absence of a custom, strictly proved, to the contrary, have, on principle and authority, a right to be consulted. The *marguilliers* chosen by the parishioners are only invested with a limited power sufficient for the

FABRIQUE—*continued.*
transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.—*Ex parte Renouf* (1 Rev. de Législation, p. 310) approved. CURÉ DE VERCHÈRES *v.* CORPORATION DE VERCHÈRES - - 330

FORFEITURE.] A testatrix, by her will dated the 18th of May, 1861, gave the usufruct of her estate to her son, the Appellant, charged with certain annuities in favour of her daughters and sisters, subject to the following condition:—"*Je veux et ordonne et ma volonté expresse est que si mes dites filles, ou aucune d'elles, venait à faire soit directement ou indirectement aucune démarche quelconque pour contester mon présent testament, qu'alors et dans ce cas mes dites filles, ou aucune d'elles qui voudraient ainsi chercher à contester mon présent testament, soient privées ou soit privée de tous droits quelconques dans ma dite succession, et de la rente viagère susdite, et que quant à celles ou celles qui voudrait contester mon dit testament, le legs à elle fait de la dite rente soit non avenu et caduc; car telle est mon intention expresse.*"—One of the said daughters, her husband being co-plaintiff with her *pro formâ*, by protracted litigation, unsuccessfully impugned the said will, as not having been duly executed, and as having been obtained by fraud and captation, and undue influence of the Appellant. They obtained a decree of the Superior Court, avoiding the will on the ground of informal execution, which was reversed by the Court of Queen's Bench; the Superior Court then on remand dismissed the suit, having decided the issues as to fraud and undue influence against them. Those issues were finally abandoned by their counsel in oral argument before the Privy Council.—In an action brought thereafter by the Respondents (the said daughter and her husband) to recover from the Appellant, in respect of the annuity charged upon the estate as above, in which the Appellant pleaded a forfeiture thereof by the female Respondent under the penal clause by reason of said litigation:—*Held*, firstly, that on the evidence the suit which impugned the will was the suit of the wife, acting as a free agent, in respect of her separate *chose in action:* Secondly, that whether or not such penal condition attaches, if the contesting legatee desists from impugning the will before "*jugement définitif*," the Superior Court's decree of dismissal was such "*jugement définitif.*"—Thirdly, that according to the true construction of the clause, it was neither void for uncertainty, nor contrary to good morals, nor prohibited by any positive law, nor contrary to public policy:—The 760th and 831st articles of the *Civil Code of Canada*, must be read together; and by virtue of their provisions all conditions in a will, unless according to the plain meaning and intention of the testator they be contrary to law, public order, or good morals are effective, and cannot be regarded as minatory only, or dependent for their application upon the discretion of the Court. Such discretion is not conferred upon the Courts by the Code, and though exercised by the old French Parliaments, has been since authoritatively condemned and repudiated.—Such a condition as that contained in the said penal clause can only, in practice, be applied where a will has been un-

FORFEITURE—*continued.*
successfully contested, and would, therefore, be ineffective to protect an illegal disposition, or to render operative an invalid testament. It is not against public order for a testator to protect his estate and representative against unsuccessful attempts to litigate his will.—*Semble*, under English Law effect is given to a condition of forfeiture so long as it is a *conditio rei licitæ*, if there is a gift over on breach thereof.—*Cooke* v. *Turner* (15 M. & W. 727) approved. Evanturel *v.* Evanturel - - - - - - 1

FORFEITURE OF LEASE: *See* Victoria Land Acts.

FUTURE CALLS: *See* Power of Directors.

GIFT OF RESIDUE TO EXECUTORS, WHETHER ABSOLUTE OR IN TRUST: *See* English Law in Penang.

GIFTS: *See* Wills.

GIFTS VOID FOR UNCERTAINTY: *See* English Law in Penang.

HABEAS CORPUS.] *M.* and *M.*, convicted at the sessions of the Supreme Criminal Court of *Victoria*, of manslaughter committed on board a British ship on the high seas, were sentenced to penal servitude for fifteen years, and were subsequently detained in a public gaol within the meaning of the Colonial Act, the *Statute of Gaols*, 1864. On a return to a writ of *habeas corpus*, to the effect that *M.* and *M.* were detained "for the cause and to the end that they may undergo the sentence aforesaid," the Court ordered that the prisoners "be discharged from their imprisonment and set at large," on the ground that, by 16 & 17 Vict. c. 99, s. 6, sentence of penal servitude could not be carried into execution in the colony without the intervention of the Secretary of State. —*Held*, by the Privy Council that the return was sufficient; and that in any case the Court erred in not remanding the prisoners until it was clear that no lawful means of executing the sentence could be found—*Rex* v. *Allen* (3 E. & E. 338) distinguished.—Although the Act (12 & 13 Vict. c. 96) under which the Supreme Court obtained jurisdiction over the prisoners only authorized a sentence of transportation according to the law of *England* then in force, and although 20 & 21 Vict. c. 3, which abolished transportation, and substituted penal servitude, does not in terms include the colonies, yet this latter Act is applicable to the colonies with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the former Act on Colonial Courts. The policy of the former Act was to authorize the Colonial Courts to try offences properly cognizable in *England*, with the consequences which would have attended a trial there; and that policy, in the absence of an expressed intention to the contrary, must govern the construction of both Acts.—The direction in 16 & 17 Vict. c. 99, s. 6, that the Secretary of State should point out the place of confinement in case of a person sentenced to penal servitude, relates only to the manner of executing the sentence, and to matters of administration, and

HABEAS CORPUS—*continued.*
therefore need not be resorted to in the case of sentences passed in the colonies, which may be executed according to the local procedure.—Under the combined effect of Imperial and Colonial legislation sentences of penal servitude may be executed in *Victoria*: were this otherwise, a sentence directed by an Imperial Act may not be treated as null, because no means have been previously provided in the colony for carrying it into effect. The Queen *v.* Mount - - 283

HYPOTHÈQUE: *See* Code Napoléon.

INSCRIPTION: *See* Code Napoléon.

INTEREST OF PROMOVENT: *See* Pleading. 1.

JURISDICTION OF BISHOP AS ORDINARY.] Upon a reredos erected for purpose of decoration in *Exeter Cathedral* by the Dean and Chapter of *Exeter* were sculptured representations in high relief of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the Day of Pentecost, with figures of the Apostles delineated as forming part of the connected representation of the historical subject. On each side of the reredos, as finials to its architectural form, was a separate figure of an angel.—The Bishop of *Exeter*, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed:—*Held* (by the Privy Council, reversing the decree of the Court of Arches), that although the bishop, as ordinary, in the exercise of his visitatorial power over the cathedral church of *Exeter*, cannot at his discretion order any alteration in its fabric, it was within his jurisdiction to find that the sculpture had been unlawfully erected, and on that definite legal ground to order its removal:—*Held*, also, that the structure was not illegal, and that so much of the decree of the Court of Arches as reversed the order of the bishop directing its removal must be affirmed. Phillpotts *v.* Boyd - 435

JURISDICTION OF ROYAL COURT OF JERSEY: *See* Special Leave to Appeal.

"LA FIN DE NON-RECEVOIR": *See* Fabrique.

LAND HELD BY BRITISH SUBJECTS IN TURKEY.] Previously to the protocol of June, 1867, permitting British subjects to hold land in *Turkey* in their own names, they were permitted only to hold land in the name of some female relative, or of some native subject of the Ottoman Empire. Two partners who owned some land before 1868 had not availed themselves of the protocol, but continued to hold the land in the name of a subject of the Sultan. A suit was instituted by one of the partners in the Supreme Consular Court of *Constantinople* for the dissolution of the partnership and for taking the accounts. An order was made in the suit that the receiver should sell the land by auction:—*Held*, that the order was not *ultra vires* of the Court. Abbott *v.* Abbott 220

LEGATEE PROHIBITED FROM CONTESTING THE WILL: *See* Forfeiture.

LEGISLATURE OF NEW BRUNSWICK: *See* Distribution of Legislative Power.

LEGISLATURE OF QUEBEC: *See* Distribution of Legislative Power.

MANDAMUS: *See* Ecclesiastical Burial.

MARINE INSURANCE.] 1. If notice of the abandonment of a ship is given by the insured to the insurers, and the insurers then say and do nothing, the conclusion is that they do not mean to accept the abandonment. But if they by their agent take possession of the ship, and then repair it and retain it in their possession for some time without repudiating the notice or informing the assured as to the character in which they are acting, then there is a constructive acceptance of the abandonment by the insurers. And a constructive acceptance produces the same effect on the rights of the parties as an express acceptance.—Where the agent who took possession of the ship, &c., was instructed to look after the interests of the insurance company; his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, having been such as to be evidence from which an acceptance might be inferred, the company was bound by his acts.—After the acceptance by the insurers of the abandonment of a ship they become liable as for a total loss.—Where a ship-policy contained a provision that the ship should not be within the *Gulf of St. Lawrence* within a prescribed period, and the ship went into the gulf within the prohibited time and was wrecked; and notice was given of an abandonment, and was accepted by the insurers; it was contended by them that the ship was not insured when she was lost, as the insurance did not extend to a loss in the gulf within the prohibited time, and that an abandonment can be of no avail where there is no insurance. However, it was—*Held*, that the vessel was in fact insured, and that the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties; and if, after a constructive total loss and notice of abandonment, the insurers, with full knowledge of all the facts, accept the notice, they cannot, when called on to pay the amount insured, resile and rely on a breach of warranty. By the voluntary acceptance of the notice of abandonment, an agreement is entered into which closes the whole matter.—An agent who insures for another with his authority may sue for the sum assured in his own name.—Interpretation of a clause in a marine policy as to a prohibition of the ship from being in the *Gulf of St. Lawrence* within a prescribed period, Provincial Insurance Company *v.* Joel Leduc - - - - - - 224

2. —— The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is.—Rule made absolute (reversing the order of the Supreme Court) for a new trial, on the ground that the verdict in favour of the insured was against the weight of the evidence as to the necessity for sale. Cobequid Marine Insurance Company *v.* Barteaux - - - - - - 319

MASTER WAREHOUSING GOODS: *See* Merchant Shipping Act Amendment Act.

MERCHANT SHIPPING ACT AMENDMENT ACT.] The *E.* was chartered at *Memel* in October, 1872, to deliver at *Dublin* a full cargo of timber under a bill of lading dated the 6th of November, duly indorsed to Respondent, making the freight payable "as per charterparty," at a specified rate, to be ascertained by measurement. At *Copenhagen* necessary repairs were executed, for expenses of which the master (the Appellant) passed a bottomry bond on ship, cargo, and freight for £2975, payable three days after the ship's safe arrival in *Dublin*, which took place on the 15th of April, 1873. Thereupon the Appellant refused to deliver the cargo to the Respondent until receipt of the contribution which was due from him for general average, then calculated at £1221. This the Respondent refused, but on the 28th he offered to pay the freight and give an average bond. On the 1st of May the owners claimed a lien on the cargo for that amount and for £700 freight, but subsequently the average payable by cargo was ascertained to be £1136, and the owners offered to release the same on receipt of £1800; but the Respondent declined to give more than £1750.—On the 3rd of May the Appellant, notwithstanding the Respondent's offer on that day to pay the average contribution in full, and to give security for the freight, proceeded to discharge the timber into a warehouse of the *Dublin* Port and Docks Board under sects. 67 and 68 of the *Merchant Shipping Act Amendment Act*, 1862, putting upon it a stop order for the sum of £2200, or £360 in excess of what was due by the Respondent. On the 12th the Respondent paid the said sum of £1136, and subsequently tendered payment of freight and (under protest) of charges, but the owners refused to release the cargo until he had discharged the stop order by paying the £2200, which he did after action brought, and was then repaid the balance, £1498, due to him thereout.—In an action brought by the Respondent in the Court of Admiralty in *Ireland* against the ship under the 37th section of the *Court of Admiralty (Ireland) Act*, 1867, claiming damages in respect of certain breaches of duty and breaches of contract on the part of the Appellant:—*Held* (affirming the decree of the Court of Chancery in *Ireland*), that the right of action was complete on the 3rd of May, and that it must be remanded to the Admiralty Court to ascertain the damages.—Although the shipowner was at liberty to land the goods under the 67th section of the *Merchant Shipping Act Amendment Act*, the Respondent having "failed to land and take delivery," yet there had been inserted in the stop order a sum manifestly and grossly in excess of that for which the master could *bonâ fide* claim a lien, and consequently the detention of the cargo thereunder was a wrongful act.—And after the payment of £1136 it was clearly the duty of the master to reduce the stop order to the amount for which he then had or could reasonably claim a lien. Miedbrodt *v.* Fitzsimon - - - - 306

MISFEASANCE: *See* Sheriff of New South Wales.

MONITION: *See* Pleadings.

MORTGAGE OF UNPAID CAPITAL: *See* Power of Directors.

NEW SOUTH WALES: *See* Crown Lands Alienation Act.

NOTICE OF FORFEITURE UNDER SECT. 101 OF LAND ACT, 1869: *See* Victoria Land Acts; Sect. 101 of Land Act of 1869.

PENAL SERVICE FOR OFFENCES TRIABLE BY COLONIAL COURTS UNDER THEIR ADMIRALTY JURISDICTION: *See* Habeas Corpus.

PERPETUITY: *See* English Law in Penang.

PLEADING: *See* Fabrique.

1. —— Where a monition issued by the Commissary-General of the diocese of *Canterbury* to an incumbent and churchwardens, ordering them to remove certain ornaments from their church unless they should shew cause to the contrary, did not disclose on the face of it any interest in the suit on the part of the promovent, and such defect was insisted upon by the churchwardens in shewing cause against the same:—*Held*, that the Judge of the Court of Arches was right in directing that the suit should be dismissed, with costs as against the churchwardens.—Such a suit is a civil suit, and is not open to every one, even with the consent of the ordinary, but only to those who have an interest in it. Lee *v.* Fagg and Mummery - - - - - 38

2. —— Where certain articles exhibited against a clergyman charged him with doing certain specified acts in his church "in a ceremonious manner," or "as connected with and forming part of the ceremonies of public worship":—*Held*, that these words amounted to allegations of fact capable of proof, and not to conclusions of law to be drawn from facts.—The averment that an incumbent has "sanctioned or permitted" in his church any alleged departure from the course of public worship as authorized by law is sufficient, without charging that such departure was authorized by the incumbent.—An averment, following the exact words of the third rubric at the end of the Communion Service, that there has been communion, that the elements were consecrated and received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only two persons communicated with him, is a sufficient allegation of an ecclesiastical offence having been committed. Parnell *v.* Roughton - 46

POLICY: *See* Marine Insurance.

POWER OF APPEAL FROM THE SUPREME COURT OF PENANG: *See* English Law in Penang.

POWER OF THE BISHOP OF THE DIOCESE OVER THE FABRIC OF THE CATHEDRAL CHURCH OF EXETER: *See* Jurisdiction of Bishop as Ordinary.

POWER OF DIRECTORS.] A power in a deed of settlement of a joint stock company authorizing the directors to mortgage or charge the property of the company, does not authorize them to include in such mortgage or charge future calls, or, in other words, the unpaid capital of the company.—*Ex parte Stanley* (4 De G. J. & S. 407; S. C. 33 L. T. 536) approved.—The capital not paid up is, according to the usual forms of deeds of settlement, only *sub modo* the property of the company; a precedent condition to the absolute proprietary right of the company therein being the due making of a call by a resolution of the board of directors. Bank of South Australia *v.* Abrahams - 265

POWER OF DIRECTORS—*continued.*

POWER OF MARGUILLIERS: *See* Fabrique.

POWER OF MASTER TO SELL: *See* Marine Insurance.

POWERS OF AVOUE: *See* Res Judicata.

PRACTICE: *See* Ecclesiastical Burial.

PRIORITY: *See* Code Napoléon.

PRIVILEGE OF CO-PARTAGEANTS: *See* Code Napoléon.

QUANTUM OF REMUNERATION: *See* Salvage Services.

RECUSATIO JUDICIS: *See* Ecclesiastical Law.

REREDOS: *See* Jurisdiction of Bishop as Ordinary.

RES JUDICATA.] On the 31st of December, 1839, certain uncollected rents belonging to the estate of a deceased person were sold by his executors to the Respondent. In 1869, the Appellant, claiming as residuary legatee under the will of the deceased, sued the Respondent and the surviving executor to cancel the sale and for an account and payment, and after certain abortive negotiations for a compromise, foreclosed the pleadings in the action. Thereupon a "transaction" was, on the 4th of June, 1870, made between the Respondent and *L.*, the counsel and attorney of the Appellant, to the effect that the cause was stayed on certain terms of payment and the foreclosure removed, "*jusqu'à nouvel avis;*" which "transaction," on the 10th of June, the Respondent revoked and pleaded to the action. Thereafter the Appellant prayed for judgment in terms of the compromise, which was refused.—In January, 1871, the Appellant brought another action to enforce the compromise, and the Respondent pleaded, first, that the pendency of the original action for substantially the same cause was a bar, or that the discontinuance thereof was a condition precedent to the right to maintain a fresh one; secondly, *res judicata;* thirdly, fourthly, and fifthly, that the "transaction" was conditional on ratification by the Court, was made by *L.* without Appellant's authority, and under mistake, surprise, or fraud:—*Held*, first, that the pendency of the first action was not a bar to the institution of the second; nor was the discontinuance of the first a condition precedent to bringing the second. The right mode of enforcing the "transaction" was by a separate action.—Secondly, the "transaction" was intended to be final, but, according to the *Canada Civil Code* interpreted by the aid of the French law, *L.*, in the absence of special authority, had not, by reason of his being "*avocat*" and "*avoué*," any power to bind his client thereby.—An *avoué* can, however, bind his client (until *désaveu*) by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. King *v.* Pinsoneault - - 245

RIGHTS OF PARISHIONERS; *See* Fabrique.

RIGHT TO THE GRANT IN FEE OF AN ALLOTMENT: *See* Victoria Land Acts.

SALE BY LICITATION: *See* Code Napoléon.

SALVAGE SERVICES.] Although the *quantum* of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered. Where the Court below had awarded an exceptional and excessive amount of remuneration solely from regard to the value of the property salved, their Lordships, notwithstanding their general rule of non-interference upon a question of mere discretion, reduced the said amount by two-fifths. The "Amérique" - - - - 468

SECT. 101 OF LAND ACT OF 1869.] A notice in the *Gazette* of forfeiture of an allotment, a lease of which had been granted under the *Land Act*, 1862, to a selector under sect. 7 of the *Amending Land Act*, 1865, is insufficient in cases to which sect. 101 of the *Land Act* of 1869 does not apply, to determine the lease. Nor as regards a lessee in possession can it preclude a Court of Equity from relieving against the forfeiture, if the lessee is otherwise entitled to relief. Attorney-General of Victoria *v.* Glass - - - 375

SHERIFF OF NEW SOUTH WALES.] *Held*, that the sheriff of the colony was liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of *capias ad respondendum*, for the damage which resulted to the Plaintiff therefrom. Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the Plaintiff, whom it rendered liable to attachment for a contempt of Court without being allowed to shew that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. Brasyer *v.* Maclean - - 398

SHIP IN TOW OF STEAM VESSEL: *See* Damage.

SPECIAL LEAVE TO APPEAL.] A bank, carried on by an unlimited and unincorporated partnership in *Jersey*, stopped payment, and, after certain proceedings in voluntary liquidation, the *Juge Commissaire*, to whom the Royal Court referred the ascertainment of claims, &c., under the *Jersey Act* of 1867, reported that the *C. F.* was a creditor (if at all) to the amount of £53,606, and, after a further reference by the same Court relating to another creditor's claim, reported that the requisite amount of assents had been obtained, and thereupon the Royal Court registered and confirmed a composition between the partnership and its creditors.—The *C. F.* petitioned for special leave to appeal, first, against the order of the Royal Court referring the matter to the *Juge Commissaire*; secondly, against the further reference by the same Court; and, thirdly, against the order confirming and registering the composition; alleging that they were entitled to claim £55,160, and that the claim of *W. B.* (who also petitioned), having been admitted at £3800, was not mentioned in the schedule, and that by reason of this and another error of computation the requisite assents had not been obtained.—Their Lordships granted leave to appeal against

SPECIAL LEAVE TO APPEAL—*continued.*

the order confirming and registering the composition, limited to two questions; first, as to the claim for £3800; secondly, as to the alleged error of computation. The foundation of the jurisdiction of the Royal Court to register and confirm would be wanting, unless the composition were shewn to have received the requisite assents. The 15th and 16th articles of the Act of 1867 must be read together. The decisions of the Royal Court are only final in reference to such a composition as it is entitled to register.—Their Lordships refused leave to proceed by a *doléance*, considering that by an ordinary appeal the petitioners could obtain relief. Crédit Foncier *v.* Elie Amy and Others. Walker Bailey *v.* Elie Amy and Others - - - 146

SPECIFIC PERFORMANCE: *See* Res Judicata Victoria Land Acts.

STATUS OF THE ROMAN CATHOLIC CHURCH IN LOWER CANADA: *See* Ecclesiastical Burial.

SUBSTITUTION: *See* Wills.

TOTAL LOSS: *See* Marine Insurance.

"TRANSACTION": *See* Res Judicata.

UNPAID PURCHASE-MONEY: *See* Code Napoléon.

VALIDITY OF ORDER BY CONSULAR COURT OF CONSTANTINOPLE FOR THE SALE OF LANDS IN TURKEY HELD BY BRITISH SUBJECTS IN THE NAME OF A TURKISH SUBJECT: *See* Land held by British Subjects in Turkey.

VESSEL TOWED NOT LIABLE FOR NEGLIGENCE OF TOWING VESSEL: *See* Damage.

VICTORIA LAND ACTS.] On the 29th of June, 1865, *S.*, who as holder of a certificate under the *Land Act*, 1862, was entitled to a right of selection under sect. 7 of the *Amending Land Act*, 1865, exercised that right, and selected an allotment of land, of which, after payment of a year's rent, he was put into possession, subject, according to the Act of 1862, to "the usual covenant for payment of rent, and a condition for re-entry on non-payment thereof." He failed to cultivate, build, or inclose within the year, as required by the 36th section of the *Land Act*, 1862: and although some subsequent rent was received, this allotment was, on the 16th of April, 1869, declared to be forfeited for "non-payment of rent, non-compliance with the provisions, and non-performance of covenants," incident to the tenure under the Act.—In 1872 *E.* purchased the allotment from *S.*, having previously received an assurance from the Government that it would receive the back rent and issue the lease. The lease was subsequently executed by the governor, and issued to *S.*, dated in conformity with sect. 11 of the *Land Act*, 1862, on the 29th of June, 1865, the day on which *S.* became entitled as selector to have it. *E.* thereupon completed his purchase, and on the 30th of July, 1872, registered his title, and obtained a certificate thereof under the *Transfer of Land Statute*. Subsequently the Government refused to receive the back rent when

VICTORIA LAND ACTS—*continued.*
tendered by *E.*—In a suit by *E.* by petition of right under the *Crown Remedies and Liability Statute*, 1865, claiming to be entitled to the grant in fee simple of the said allotment, as the registered proprietor of the lease as aforesaid, the Government contended that the lease to *S.*, or the right to it, was forfeited, and became absolutely void, (*a*), by non-improvement within a year; (*b*), by non-payment of rent; (*c*), by breaches of covenant as above. *E.* replied that the forfeiture could be and was waived, (*a*), as to non-improvement and other breaches of covenant, by subsequent receipt of rent, and by issuing the lease to *S.*; (*b*), as to non-payment of rent, by issuing lease to *S.*; otherwise, that he was entitled in equity to relief against the forfeiture:—*Held*, that, having regard to sect. 22 of the Act of 1862, the forfeiture was capable of being waived, and was, in fact, waived by the subsequent acceptance of rent, and by the issuing of the lease to *S.* Notwithstanding that such lease was, under sect. 11 of the said Act, dated before the forfeiture occurred, it operated to affirm the tenancy, of which it waived the forfeiture, together with all interests springing therefrom, including the right to a grant of the fee. Otherwise, and if there had been no waiver, the lessee in possession was entitled, both under the Act and the terms of the lease, to relief in equity against the forfeiture for non-payment of rent, and to a decree for specific performance, upon proper terms, of the statutory contract.—*Keating* v. *Sparrow* (1 Ball & Beattie, Ir. Ch. Rep. 367) distinguished.—Persons entitled to exercise rights of selection under sect. 7 of the *Amending Act* of 1865 are liable to the penalty imposed by sect 126 of the Act of 1862.—Sect. 101 of the *Land Act* of 1869 must not be construed so as to make notice in the *Gazette* evidence not only of a forfeiture, but also of the right to forfeit, in cases where no substantive power had been previously given to the governor to declare a forfeiture, nor any corresponding provisions made for enabling lessees to shew cause against the exercise of such a power.—*Quære*, whether this section applies to leases issued after the Act has come into operation.—*Quære*, as to the effect of the certificate of title obtained by *E.* under the *Transfer of Land Statute*.—The claim in this petition of right arises out of a contract with her Majesty within the meaning of sect. 27 of the *Crown Remedies and Liability Statute*, 1865, since the right to the grant of the fee, although created by statute, is conferred upon the holder of a lease, as a statutory right annexed to the lease and an implied term of the contract. ATTORNEY-GENERAL OF VICTORIA *v.* ETTERSHANK - - - 354

WAIVER: *See* VICTORIA LAND ACTS.

WILL: *See* ENGLISH LAW IN PENANG.

1. —— The conjoint operation of the Imperial Act (14 Geo. 3, c. 83) and of the Canadian Act (41 Geo. 3, c. 4), is to abrogate the old law which prohibited gifts by will to adulterine bastards.—Under the old law, derived from the Roman Law,

WILL—*continued.*
and subsequently incorporated into the Canadian Code (see sect. 838), wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined. KING *v.* TUNSTALL - 55

2. —— *H. F.*, a merchant of *Montreal*, by his will, dated the 23rd of April, 1870, devised and bequeathed his residuary estate to trustees in trust "to establish at *Montreal* an institution to be called the '*Fraser Institute*,' to be composed of a free public library, museum, and gallery," and to be governed as therein mentioned; "and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me." After giving further directions as to the composition of the board of governors of the "*Fraser Institute*," he proceeded:—"And so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall forthwith be conveyed over to the corporation to be thereby formed, to be called 'the *Fraser Institute*' for the purposes herein declared."—In a suit by the Respondents as the heirs and representatives of the testator to set aside the above disposition:—*Held* (reversing the decision of the Court of Queen's Bench for *Lower Canada*), that it ought to be sustained. It was a disposition for a lawful purpose within the meaning of Art. 869 of the Canadian Code; while as to the bequest in favour of a corporation to be thereafter formed, there was no restriction against it to be found in the Code; and as to the devise, the prohibitions contained in sects. 366 and 836 of the Code relate to the acquisition of immoveable property by corporations already formed. A devise by which property is given, not to trustees with power of perpetual succession, but simply to trustees directed to convey to a corporation only in the event of its being lawfully created with permission to possess it, is not within the scope of the said sections.—*Held*, further, that the gift not having been made to a society not in existence at the testator's death, but to intermediate fiduciary legatees, whose appointment is permitted by sect. 869 of the Canadian Code, did not lapse. Under Article 838 the capacity of the substituted society to receive is to be considered relatively to the time when the right to receive comes into effect. The second article of the King's Edict of 1743 is abrogated by the *Civil Code of Canada*, as being contrary to or inconsistent with its provisions.—But apart therefrom the gift being on an implied condition, the fulfilment of which would render it lawful, is not illegal as a gift in mortmain.—*Attorney-General* v. *Bowyer* (3 Ves. 724) approved. ABBOTT *v.* FRASER - 96

WRONGFUL DETENTION OF CARGO UNDER A STOP ORDER FOR AN EXCESSIVE AMOUNT: *See* MERCHANT SHIPPING ACT AMENDMENT ACT.

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